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PREFACE

TO THE FOURTEENTH EI

By the General Edit

THE *position of one who is, for the upon to edit a work of the sta popularity of Stephen's Commen altogether enviable. On the one h but feel it something in the natu to alter a text which has, by lo assumed an almost canonical char other, he is bound to realise, that changes which have taken place branches of English Law, since t made its appearance, necessitate a vig and a fearless pruning, if the book as an accurate exponent of existing fa*

So far as the material of the work this latter consideration has been overwhelming. The Editor has be

hand; and, with the full concurrence of the proprietors of the copyright, he has excised much antiquarian matter, and replaced it by chapters on various branches of the law, which have assumed great importance since Blackstone wrote his celebrated treatise. Thus, for example, the Law of Contract, which was treated so briefly by Blackstone, and which, even in the former editions of Stephen, was unduly compressed, has received treatment more adequate to its prominence in modern law; Dr. J. M. Gover having practically re-written this part of the Work, which now contains a comprehensive treatment of the elements of the subject. To this part of the Work has also been added a short new section on the important subject of Bills of Sale; and, in the same volume, the passages relating to the Employers' Liability Act, and the Workmen's Compensation Acts, have been very carefully revised and expanded.

A similar treatment has been accorded to the equally important subject of Equity. Blackstone, a common-lawyer, treated Equity very briefly, as a mere ancillary and procedural excrescence upon the rules of the common law. It is doubtful whether this course was justifiable, even when Blackstone wrote; it certainly cannot be justified, now that the efforts of the old Court of Chancery and its

successors have built up an elaborate system of substantive law, which, despite the Judicature Acts, is still a distinct branch of our jurisprudence. It is true, that this system of substantive law grew originally out of procedural remedies; and this fact has been recognised by the retention of Stephen's chapter on *Equity in its Relation to Law*, substantially in its original form. But, following upon this chapter, will be found four entirely new chapters, contributed by Mr. J. A. Strahan, in which the substantive rules of Equity are reproduced, in a simple and comprehensive manner, for the benefit of students.

On the other hand, certain parts of the Work, which have now become of a purely antiquarian character, have been omitted. The Editor would be the last to deny the value of the historical method, in dealing with the elements of our legal system; but it is better to reserve the application of that method to those parts of the law which have at the present day practical importance, than to attempt to extend it, in an elementary work, to obsolete subjects. The beginner is, for example, hardly likely, at the present day to learn very much from an account of the antiquities of the law of dower, or from the now obsolete arrangements made for the civil administration of populous

parishes at the beginning of the last century. The addition of the new matter above referred to, has, accordingly, been balanced by the omission of a good deal of obsolete material. It is with satisfaction that the Editor has realised, that, as the result of his treatment, the whole Work, notwithstanding the introduction of much new matter, is actually seventy pages shorter in the present, than in the preceding edition.

The mention of the names of Dr. Gover and Mr. Strahan will serve to call the attention of the reader to another new feature in the present edition. Previous editors have, doubtless, consulted specialists on different branches of the Work; but, for the first time in the long history of Stephen's *Commentaries*, the revision of the whole book has been systematically apportioned amongst experts, each of whom has undertaken to be responsible for a definite share of the text. The Editor has no hesitation in confessing that, but for help of this kind, he would have felt himself unable to undertake a task demanding such a wide knowledge of the law; and he congratulates the public and himself on the co-operation of the brilliant list of distinguished jurists whose names appear on the title-pages of the Work, and to whom his cordial thanks for their valuable and courteous assistance are abundantly due.

Passing from the material of the Work to its form, the Editor deems it advisable to state that, in this respect, he has been guided by somewhat different principles.

In those parts of the book which deal with the more modern law, the Editor saw no special reason to abstain from smoothing out the intricacies and obscurities introduced by successive editings. Sentences of prodigious length (amounting in one case to nearly three hundred words) have been broken up into more modest dimensions. Frequent repetitions of almost identical statements have been compressed and generalized. The whole of that part of the Work which deals with the *Social Economy of the Realm* has been re-arranged, in view of the changes recently introduced into our system of Local Government; and the important chapter on Sanitary Law has been entirely re-written by Mr. Alexander Macmorran. A similar course has been adopted with the chapter on the Conveyancing and Settled Land Acts, it having been thought well to retain, for the present at least, a separate treatment of these modern features in our Real Property system. But it is to be noted, that full references to the appropriate provisions of these Acts will also be found in the chapters dealing with the general subject of Land Law.

On the other hand, in those portions of the Work which more closely reproduce the original text of Blackstone, the changes made by the Editor are of a distinctly conservative character. Whatever may have been Blackstone's faults, he was a master of style; and a careful study of the alterations made in his language by successive editors has generally resulted in an increased respect for Blackstone's original version. In some cases, changes appear to have been made from the mere wanton desire of change, usually with disastrous results; and in all these instances, where they have come under his notice, the Editor has restored the original text. An unhappy tradition of a past generation held that a law book ought to be unreadable; it is largely to Blackstone that we owe a healthier tone in modern opinion.

In minor matters, much has been done in the present edition to lighten the labour of readers, and especially of students. It seems to be quite time that the efforts of the Legislature in reforming the mechanism of Acts of Parliament should receive recognition; and, accordingly, the official short titles of Statutes have been substituted for the quotations by the regnal year and chapter, which latter will, however, be found in the Table printed in the first volume. Another useful reform, viz., the dating of

judicial decisions, has also been adopted; and the Editor is indebted for much useful help in this direction to Harry Procter, Esq., of Lincoln's Inn, Barrister-at-Law.

In conclusion, the Editor must be allowed to express his obligation to the careful criticisms of the Thirteenth Edition which appeared in the *Solicitors' Journal*, the *Law Journal*, *Law Notes*, and the *Law Students' Journal*, by which he has greatly profited. He has also to thank his former pupil, Mr. A. Andrewes-Uthwatt, B.C.L., of Gray's Inn, for help in the verification of dates, and the preparation of the Table of Contents.

July, 1903

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[* NOTE.—The important contributions which have been made in recent years to our knowledge of the history of English Law have thrown a good deal of doubt on some of Blackstone's statements, contained in this chapter. Inasmuch, however, as in the present state of historical criticism, many important questions are still open to doubt, it has been thought better to leave Blackstone's statements substantially unaltered, calling attention in footnotes to some of the more debateable points.—E. J.]

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INTRODUCTION.

SECTION I.

OF THE STUDY OF THE LAW.

At the outset of a work like the present, in the course of which it is proposed (though with the aid, in part, of materials derived from a former writer) to bring under examination no less a subject than the entire body of the English law, the discouragement to which the writer is naturally inclined by the magnitude of the task before him, is counteracted by the recollection of its general importance. The subject is one to which no class of readers in the realm can be indifferent; for it is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under. [And a knowledge of the law is still more incumbent upon men of rank and education, the nobility and gentry of this realm, who are under duties both to the public and to themselves, and cannot discharge such duties without some degree of knowledge in the laws. And gentlemen, in particular, who profess (or who practise) the civil or the canon law are (of evident necessity) bound to make themselves acquainted with the common law; for the civil and canon laws are of no force in this kingdom, save so far as they have in some few cases been allowed by our laws. And in those cases wherein a reception has been thus allowed to the civil and canon

[laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them, or if the judges proceed according to the decisions of those laws, in cases wherein they are controlled by the law of the land, the common law courts will, in either instance, prohibit and annul their proceedings]. But, most of all, a knowledge of the English law is necessary for those gentlemen who are preparing to become barristers or solicitors, with a view to practising in any of the numerous courts which administer that law, or conducting, on behalf of their clients, any of those countless transactions which are regulated by English law.

The general necessity for an acquaintance with English law being thus apparent, it might naturally be supposed that some provision would antiently have been made for this, as for other branches of education, in the universities of Oxford and Cambridge. The reverse, however, was the fact; and the explanation is historical and instructive.

The common law, most of which is now embodied in Acts of Parliament, or judicial decisions, at one time consisted of a collection of unwritten customs, which had subsisted immemorially in this kingdom; [and these customs, with their associated maxims, were at one time, as Mr. Selden tells us, taught in the monasteries, *in the universities*, and in the families of the principal nobility (*a*). The clergy, in particular, were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them, soon after the Conquest, by William of Malmsbury (*c*). The judges therefore were usually created out of the sacred order (*d*); and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. But the

(*a*) *Ad Fletam*, 7, 7.
(*c*) *De Gest. Reg.* 1, 4.
(*d*) Dugdale, *Orig. Jurid.* ch. 8.

[common law, not being committed to writing, but only handed down by tradition, was not relished by the foreign clergy, who came over during the reigns of the Conqueror and his two sons, and who were utter strangers to its provisions. And its popularity, among the same persons, was seriously diminished in the 12th century, by the new impulse then given to the study of the Roman law (*e*), which became in a particular manner the favourite of the clergy, who borrowed the method, and many of the maxims, of their canon law, from this original. The study of the Roman law was especially revived by the foundation, about this time, of many foreign universities, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science. And many nations on the continent, beginning to recover just then from the convulsions consequent upon the overthrow of the Roman empire, also adopted the civil law as the basis of their several constitutions, blending and interweaving it among their own feodal customs, in some places with a more extensive, in others with a more confined authority (*f*). Nor was it long before the prevailing tendency reached England. For Theobald, a Norman abbot, being elected, in the year 1138, to the see of Canterbury, and being extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest, Roger, surnamed Vacarius, whom he placed in the university of Oxford to teach it to the people of this country (*g*). But it did not meet with the same easy reception in England; for although the monkish clergy, devoted to the will of a

(*e*) It has been said (and the opinion is adopted by Blackstone) that this revival was owing to the accidental discovery of a copy of the Pandects at the capture of Amalfi by the Pisans, about the year 1130. But there appears to be no sufficient evidence that any such discovery took place.

(*f*) Domat. *Treatise of Law* c. 13, s. 9; Epistol. Innocent IV. in M. Paris, A.D. 1254.

(*g*) Gervas. Dorobern. *Act. Pontif. Cantuar.* (Rolls Series), p. 384.

[foreign primate, received it with zeal, yet the laity, who were more interested to preserve the old constitution, continued wedded to the common law. And King Stephen even published a proclamation forbidding the study of the foreign laws (*h*),—a proclamation which was treated by the monks as a piece of impiety (*i*), and which, although it may have hindered the introduction of the Roman law into our courts of justice, yet did not hinder the clergy from teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties: the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law. Both of these parties were reciprocally jealous of what they were unacquainted with, neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers speak of our municipal laws upon all occasions (*k*); and, on the other, from the firm temper which the nobility showed at the famous parliament of Merton, when the prelates endeavoured to procure an Act to declare all bastards legitimate upon the subsequent intermarriage of their parents. For "all the earls and barons "with one voice answered, that they would not change the "laws of England, which had hitherto been used and "approved" (*l*). And in the reign of Richard the Second, the nobility again declared, "that the realm of England "hath never been unto this hour, neither by the consent of

(*h*) Rog. Bacon. citat. *per* Selden *Ad Fletam*, 7, 6; Fortesc. *De Laudibus* c. 33; and 8 Rep. Pref.

(*i*) Joan. Sarisburiens. *Polycrat.* 8, 22.

(*k*) *Ibid.* 5, 16; Polydor. Virgil, *Hist.* 1, 9.

(*l*) "*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*" Stat. Merton (1235), 20 Hen. 3. c. 9.

["our lord the king, and the lords of parliament, shall it "ever be, ruled or governed by the civil law" (*m*).

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and in the reign of Henry the Third, episcopal constitutions were published, forbidding the clergy to appear as advocates *in foro sæculari* (*n*). Nor did they long continue to act as judges there, not caring to take the oath of office, in all things to determine according to the law and custom of the realm (*o*). And Pope Innocent the Fourth is reported (though on somewhat doubtful authority) to have forbidden the very reading of the common law, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity (*p*).

The common law being thus neglected by the clergy, the study and practice of it devolved of course into the hands of laymen, who entertained upon their parts a most hearty aversion to the civil law, and made no scruple to profess their contempt, nay, even their ignorance of it, in the most public manner (*q*). But, as the balance of learning was still greatly on the side of the clergy, the study of the common law must have been subjected to many inconveniences, had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The incident which I mean was the fixing of the Court of Common Pleas in one certain spot, namely, at Westminster,

(*m*) Selden, *Jan. Anglor.* 1, 2, s. 43; Fortesc. *De Laud.*, c. 33. [It may well be doubted (see Pollock and Maitland, *History of English Law*, 2nd ed. vol. i. p. 133) whether Blackstone's picture of the two parties, one ecclesiastical, the other lay, is really in accordance with the facts. But it is undoubtedly true, that for some time it was doubtful, whether native English law would hold its own against the Roman system.—E. J.]

(*n*) Wilkins. *Concil.* vol. i. pp. 574, 599.

(*o*) Selden *Ad Fletam*, 9, 3.

(*p*) Matthew Paris. *Chronica Majora* (Rolls Series) v. 427–8.

(*q*) Fortesc. *De Laud.* c. 28.

[which great improvement in the administration of justice was effected by an article in the great charter of liberties, by which it was directed, that "common pleas should no "longer follow the king's court, but be held in some "certain place." This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body or society addicted (as Spelman observes) wholly to the study of the common law (*r*). And they soon brought that law to the pitch of perfection, which it attained under the auspices of our English Justinian, King Edward the First.

In consequence of this lucky assemblage, the practitioners of the common law naturally fell into a kind of order; and, being excluded from Oxford and Cambridge, they established a new university of their own. This they did by purchasing at various times certain houses (afterwards called the inns of court and of chancery) between the city of Westminster and the city of London; for advantage of ready access to the one, and plenty of provisions in the other (*s*). There exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers, at first styled apprentices (*apprenticii ad legem*), who answered to the bachelors; and those of serjeants (*servientes ad legem*), who answered to the doctors of the universities (*t*). The crown seems soon to have taken under its protection this infant seminary of the common law; and, the more effectually to foster it, King Henry the Third, in the nineteenth year of his reign, issued an order to the Mayor and Sheriffs of London, commanding that no regent of any law schools within the city should, for the future, teach "the laws" (*leges*) therein (*u*). Whether

(*r*) *Glossar.* 334.

(*s*) Fortesc. c. 48. The Inns of Court are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn.

(*t*) As to barristers and serjeants, see *post*, bk. v. c. ii.

(*u*) "*Ne aliquis scholas regens de legibus in eadem civitate, de cætero ibidem leges doceat.*"

[the Roman law only was prohibited by the order, which is Mr. Selden's opinion (*v*), or whether the municipal law also was included in the prohibition, as Sir Edward Coke understands it (*x*), the effect of it was to collect all the common lawyers into the one public university then newly instituted in the suburbs.

In this juridical university, for such it is insisted to have been by Sir Edward Coke (*y*), there were two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying (says Fortescue) the originals, "and, as it were, the elements, of the law; who, profiting "therein, as they grew to ripeness, so were they admitted "into the greater inns of the same study, called inns of "court" (*z*). And although, under the influence of the clergy, our universities neglected the study, yet in the time of Henry the Sixth it was become the universal practice for the young nobility and gentry to be admitted into the inns of court and chancery, there to be instructed in the originals and elements of the laws (*a*).]

At the present day the inns of chancery have sunk into insignificance. But the inns of court still enjoy their antient reputation with the sons of our nobility and gentry; and they exercise also the exclusive privilege of conferring the degree of *barrister at law*, the possession of which degree is an indispensable qualification for practising as counsel in the superior courts. And for the obtaining of this degree, it is necessary to be enrolled as a student in one or other of these inns (*b*), and after a

(*v*) *Ad Flet.* 8, 2.

(*x*) See 2 Inst. proëm.

(*y*) 3 Rep. Pref.

(*z*) C. 49.

(*a*) The Inns of Chancery were latterly Clifford's Inn, Clement's Inn, New Inn, Staple's Inn, and Barnard's Inn. Besides these, there were formerly Furnival's Inn, the Strand Inn, Lyon's Inn, and Thavies' Inn. As to Inns of Chancery, see *Rex* v. *Barnard's Inn*, (1836) 6 A. & E. 17, and the Report of the commissioners appointed to inquire into their constitution, which was presented to Parliament in the year 1855. See also *Smith* v. *Kerr*, [1900] 2 Ch. 511.

(*b*) The candidate for admission as a student, unless he shall have

certain period to apply to its principal officers (or *benchers*) for a *call to the bar* (*c*). As a qualification for call, the student must (as the general rule) have kept commons for three years (*i.e.* twelve terms), by dining at least six times in each term in the hall of the society into which he has obtained admission; excepting that if he is a member of an university in the United Kingdom, dining three times in each term is sufficient (*d*). Moreover, no student may be called to the bar, unless he has passed a public examination for the purpose of ascertaining his fitness.

Accordingly, a public examination, for all the inns collectively, takes place periodically; and this examination is compulsory in the case of all students, except for certain colonial barristers who desire to be called to the English Bar (*e*).

Academical instruction in the law may, however, now be obtained in schools other than those of the inns of court; and though no provision for instruction in the common law was antiently made at either Oxford or Cambridge, that deficiency has been long since redressed by the munificence of private donors, who at each of these universities have founded professorships, with appropriate

passed a public examination at some university within the British dominions, or for a commission in the Army or Navy, or for the Indian Civil Service, or for the Consular Service, or for cadetships in the three eastern colonies of Ceylon, Hong Kong, and the Straits Settlements, must in general pass a preliminary examination testing his knowledge of the English and Latin languages, and of English history. (See Consol. Reg., June, 1899). As to the relation which exists between the Inns of Courts and those who have become members, see *Neate* v. *Denman*, L. R. (1874) 18 Eq. 127; *Manisty* v. *Kenealy*, (1875) 24 W. R. 918.

(*c*) An appeal from the decision of the benchers as to calling to the bar or disbarring, lies to the judges in their capacity of *visitors*. (See *The King* v. *Lincoln's Inn*, (1825) 4 B. & C. 855.)

(*d*) Consol. Reg. June, 1899, artt. 11–12.

(*e*) *Ibid.* artt. 41–49. For the purpose of affording to students the means of obtaining instruction and guidance in their legal studies, Professors (now called Readers and Assistant Readers) are appointed by a joint council of the Four Inns.

endowments for that purpose. And in the various colleges of the University of London, and the Victoria University (*f*), and at Bristol, and elsewhere in England, there are also now very effective schools of the common law.

(*f*) By the Victoria University Act, 1888, the graduates of this university have been placed upon the same level with graduates of the Universities of Oxford, Cambridge, and London, with regard to privileges and exemptions, and eligibility to appointments. By the University of London Act, 1898, provision is made for the re-constitution of the University of London.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

[MAN, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being; and as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. This will is called the Law of Nature; and there are three great principles of this law, namely, that we should live reputably, should hurt nobody, and should render to every one his due. To which three principles Justinian has reduced the whole doctrine of law (*g*).

The constitution and frame of humanity afford a striking proof of the benevolence of the Creator, the laws of eternal justice being inseparably interwoven with the happiness of every individual. But, the human reason not sufficing, of itself, to teach this law, the beneficence of the Deity has aided the imperfection of human reason by an immediate and direct revelation, this revealed law being declared by the Holy Scriptures; and upon these two foundations, the Law of Nature and the Law of Revelation, depend all human laws.

But man was formed for society, and is not capable of living alone, nor indeed has the courage to do it; and, it being impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, forming separate states and nations, independent of each other, and yet enjoying a mutual intercourse. Hence arises a third kind of law to regulate this mutual

(*g*) "*Juris præcepta sunt hæc, honestè vivere, alterum non lædere, suum cuique tribuere.*"—Inst. l. 1, 3.

[intercourse, called "the Law of Nations," or the *jus gentium*.

And thus much being premised concerning the law of nature, the revealed law, and the law of nations, there remains to be considered (and at much greater length) the municipal law, being the rule by which particular nations are governed (*h*).

Municipal law, thus understood, is properly defined as being "a rule of civil conduct prescribed by the supreme power in a state." Let us endeavour to explain its several properties, as they arise out of this definition.

And, first, it is a *rule:* not a transient particular order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore, a particular Act of Parliament, to confiscate the goods of A., is rather a sentence than a law, being exhausted upon A. But an Act to declare that a certain crime of which A. is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*. It is also called a rule, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and also from a *compact* or *agreement;* the language of a compact being "I will, or will not do this," while the language of a law or rule is, "thou shalt, or shalt not, do it."

Municipal law is also "a rule *of civil conduct*," as distinguished from a rule of morals or of faith; for municipal law regards man as a citizen, and as being bound towards his neighbour in other duties than those of mere nature and religion.

Municipal law is also "a rule *prescribed*," a bare resolution confined within the breast of the legislator not being properly a law. For it is requisite that the resolution

(*h*) [The term "municipal law" (as Blackstone himself admits) is not free from ambiguity, being liable to be confounded with the customs or by-laws of a municipality or town. The expression "national law" seems to be more apt for his purpose.—E. J.]

[shall be notified (that is to say, prescribed), to the people who are to obey it. But the manner in which this notification is to be made, is matter of indifference. For the rule may be notified by universal tradition, which supposes a previous publication, and is the case with the common law of England. Or it may be notified *vivâ voce*, by officers appointed to proclaim it, as is done with proclamations. Or, lastly, it may be notified by writing, printing, or the like, which is the general course in the case of Acts of Parliament.

Further, the municipal law is "a rule of civil conduct prescribed *by the supreme power in a state*." For legislation is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made, or at least enforced, by the supreme power.

This leads us to inquire shortly concerning the nature of society and of civil government; and the natural inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and fears of individuals, single families having first formed a natural society among themselves, which, every day extending its limits, passed gradually into a civil or political society. And this, when it grew too large to subsist with convenience as one society or state, necessarily subdivided itself into more.

When civil society is once formed, government results of course, as necessary to keep that society in order. For unless a superior be constituted, whose commands and decisions all the members shall obey, they would still remain as in a state of nature. But in what way this superior was constituted, or (in other words) in what way the several forms of government which we now see in the world at first actually began, is a matter of great uncertainty, and has occasioned infinite disputes.

The political writers of antiquity allow only three

[regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

In a democracy, where the right of making laws resides in the people at large, public virtue or goodness of intention is more likely to be found, than in either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, but less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any, all the sinews of the government being knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes. Thus, democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the antients, as was observed, had in general no idea of any other permanent form of government but these three; for though Cicero was of the opinion that a mixture of all three was better than any or either of them singly (*i*), yet Tacitus treated the notion of such a mixture as a visionary whim, and a mixed government (he said) could never be either lasting or secure (*k*). But, happily for us, the mixed government

(*i*) *De Rep.* l. 2. c. 3.

(*k*) "*Cunctas nationes et urbes populus, aut primores, aut singuli regunt: delecta ex his et constituta*

[which Tacitus ridiculed is both a possible and a lasting government; for, according to the British constitution, the executive power is lodged in a single person, while the legislative power is committed to the king, the lords spiritual and temporal, and the commons, three bodies constituting one aggregate body, in which is lodged the sovereignty.

Whatever the form of government, wherever the supreme authority in any state resides, it is the right of that authority to make laws, or, in the words of our definition, *to prescribe the rules of civil conduct.* And this follows from the very end and institution of a State. For a State is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. And, in order to act as one man, the State must act by one uniform will. Wherefore, all the individual citizens submit their private wills to the will of one man, or assemblage of men, to whom the supreme authority is entrusted. And the will of that one man, or assemblage of men is, in different States, according to their different constitutions, understood to be the *law.* And it is not merely the *right* of the supreme power to make laws; but it is its *duty* also to do so, for the perpetual information and direction of all the individual citizens; in order that every man may know what to look upon as his own, and what to look upon as another's; what is to be esteemed honest, and what dishonest or indifferent; what degree he retains of his natural liberty, and what he has given up as the price for the benefits of society; and so forth.

Every law may be said to consist of several parts. One *declaratory*, whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down. Another *directory*, whereby the subject is

reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest."—Ann. l. iv. ch. 33.

[instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs. A third *remedial*, whereby a method is pointed out to recover a man's private rights, or to redress his private wrongs. To which may be added a fourth, namely, that part of the law which contains the *sanction* or provision for enforcing the observance of the law.

With regard to the *declaratory* part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator; and has very little force or operation with regard to actions which (according to the law of nature) are essentially either right or wrong. With regard to things in themselves indifferent, these become either right or wrong, according as the municipal legislator deems proper for promoting the welfare of society, and the purposes of civil life.

The *directory* part of municipal law stands much upon the same footing as the declaratory part; and, in fact, the directory includes for the most part the declaratory, the declaration being usually collected from the direction. For example, the law that says "thou shalt not steal," implies a declaration that stealing is a crime.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be vague and imperfect without it. For in vain would rights be declared, and directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded.

With regard to the *sanction* of laws, it is observed, that human legislators have for the most part chosen to make sanctions rather *vindicatory* than *remuneratory*, or to consist rather in punishments, than in rewards, the dread of evil being a much more forcible principle of human actions than the prospect of good (*l*).

(*l*) Locke, *Human Understanding*, b. 2, ch. 21.

[Legislators and their laws are said to *compel* and *oblige*. Not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law. For, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty. For rewards, in their nature, can only *persuade* and *allure*; nothing is *compulsory* but punishment.]

SECTION III.

OF THE LAWS OF ENGLAND.

[The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may, with sufficient propriety, be divided into two kinds, namely, the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law. The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom. But, when we call these parts of our law "unwritten," it is not to be understood that the whole of it is at present merely *oral*. For although, in the profound ignorance of letters which formerly overspread the whole western world, all its laws were at one time entirely traditional, still with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts, in the books of reports and judicial decisions, and in the treatises of learned sages of the law, preserved and handed down to us from the remotest antiquity. And these parts of our law are styled *leges non scriptæ*, because their original institution and authority were not set down in writing, as Acts of Parliament are; but they receive the force of law, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our antient lawyers, and particularly Fortescue (*m*), insist with abundance of warmth, that these customs are as old as the primitive Britons, and that they have continued down to the present time, unchanged and

(*m*) Cap. 17.

[unadulterated. And this may be the case as to some. But the assertion (as observed by Selden) must be understood with many grains of allowance, and is merely intended to signify that there never was any formal exchange of one system of laws for another. For, doubtless, the Romans, the Picts, the Saxons, the Danes, and the Normans, insensibly introduced and incorporated many of their own customs with those that were before established, altering thereby the texture of the whole.

Indeed, our antiquarians and first historians do positively assure us, that our body of laws is of this compounded nature. For they tell us that, in the time of Alfred, the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile a *Dom-boc* or *Liber Judicialis*, for the general use of the whole kingdom.] And, although this assertion, in its literal meaning, can no longer be accepted, yet the fragments of the early English custumals which still survive (*n*), among them being several attributed to the reign of Alfred, are sufficient to substantiate the general truth of the view, that the old English customary law was derived from very various sources.

[Under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "Laws of Edward the Confessor;" and, inasmuch as the formal document, which for long passed by that name, has been decisively shewn to be spurious, it seems probable that the phrase simply stood for those antient English customs to which we have just referred, and with which, as representing the national aspirations of the conquered English, the name of the last legitimate

(*n*) The standard edition is that by F. Liebermann (*Gesetze der Angelachsen.* Niemeyer (Halle)), now in progress. Older editions are those of Thorpe and Schmid.

[English monarch was naturally connected. The Norman princes made frequent engagements to restore and maintain these laws, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. And it is not unreasonable to believe that these, or some other remains of the law established in this country before the Conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the *common law*, a name either given to it in contradistinction to other laws,—as the statute law, the civil law, the law merchant, and the like—or more probably, as the law *common* to all the realm.]

To assign, however, to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. For our system of tenures was chiefly constructed, if not first founded, by the Norman conqueror and his followers; our antient judicial forms and pleadings have little in common with the Anglo-Saxon style, and are in striking conformity with the Norman; moreover, the general language of the law, and the terms of art familarly used therein, are exclusively of French extraction (*o*). So that we are bound to recognise in the antient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features (*p*).

[But, though these are the most likely foundations of the collection of maxims and customs which constitute

(*o*) "*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt, nihilque cum Saxonica lingua habent affine.*"—Craig, *Jus Feud.* lib. 1. s. 7, § 2.

(*p*) The similarity of the English and Norman laws is strongly illustrated by a comparison of the Grand Coustumier of Normandy (compiled as late as Ric. I. and probably later), with our Glanville, who wrote in the reign of Hen. II. This subject is discussed by Hale in *Hist. C. L.* ch. 6. Hale, jealous for the originality of the English law, argues from the posteriority in date of the Grand Coustumier, that, in most of the particulars where the conformity is to be traced, the merit of the first

[the common law, yet these maxims and customs are of a higher antiquity than memory or history can reach (*q*), nothing being more difficult than to ascertain the precise beginning or first origin of an antient and long established custom. Whence it is that, in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, "time whereof the memory of man runneth not to the contrary." This it is which gives to custom its weight and authority, and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

This unwritten, or common, law is distinguishable into three kinds: I. General customs, which are the universal rule of the whole kingdom, and form the common law in its stricter signification; II. Particular customs, which, for the most part, affect only the inhabitants of particular districts; III. Certain particular laws, which by custom are adopted and used by some particular Courts, of pretty general and extensive jurisdiction.

I. As to general customs, or the common law, properly so called, this is that law by which proceedings and determinations in the courts of justice are principally guided and directed. This, for the most part, settles the course in which land descends by inheritance, the manner and form of acquiring and transferring property, the solemnities and obligations of contracts, the rules for expounding wills, deeds, and Acts of Parliament, the respective remedies for civil injuries, and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common

introduction presumably belongs to England, though he admits the reasonableness of assigning it in others to Normandy. It does not, however, seem very material in which of the two countries they were first established. They have at all events no resemblance to the Anglo-Saxon institutions, and are evidently due to lawyers of the Norman school.

(*q*) Hale, *ubi sup.* ch. 3.

[justice requires (*r*)]. And although the great legislative activity of the past century has embodied many of the rules of the common law in Acts of Parliament, yet there are still many more important doctrines which are independent of this formal establishment. Thus, for example, that the eldest son alone is heir to his ancestor; that a deed is of no validity unless sealed and delivered; that wills shall be construed more favourably, and deeds more strictly; these, and many others which might be instanced, are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

[But here a very natural, and very material, question arises. How are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the several courts of justice. They are the depositaries of the laws; the living oracles, who in all cases of doubt must decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions (*s*), and from being long personally accustomed to the judicial decisions of their predecessors. And indeed, these judicial decisions are the most authoritative evidence of the existence of the common law. The judgments themselves are carefully registered and preserved under the name of *records*, in public repositories set apart for that particular purpose (*t*); and to them frequent recourse is had, when any critical question

(*r*) Hale, *Hist. C. L.* ch. 2.

(*s*) Cap. 8.

(*t*) As to records, see Co. Litt. 260 a, and the note by Mr. Hargrave. By the Public Record Office Act, 1838, the public records of the kingdom were placed under the superintendence of the Master of the Rolls for the time being, and a Public Record Office established. To this office have also been transferred the whole of the deeds, books, documents, and papers belonging to the suitors in the Court of Chancery, which were formerly in the custody of the Masters in Chancery.

[arises, in the determination of which former precedents may give light or assistance. For it is an established rule, to abide by former precedents, where the same points come again in litigation; because the scale of justice is not intended to waver with every new judge's opinion, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land. But if it be found that any former decision, *as reported*, is manifestly absurd or unjust, the judges will subsequently declare, not that such a sentence was *bad law*, but that it was *not law*.

The decisions of the judges are not only preserved as authentic records in the offices of the courts, but are also perpetuated in the numerous volumes of *Reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, (which used to be preserved at large in the record,) the arguments on both sides, and the reasons the court gave for its judgment, taken down by persons of skill present at the determination. The reports are extant in a regular series from the reign of King Edward the Second: and from his time to that of Henry the Eighth inclusive, they were taken by the prothonotaries, or chief scribes of the courts, at the expense of the Crown, and were published *annually*, whence they are known under the denomination of the *Year Books* (*u*). In the reign of the latter monarch, however, this series was closed; and though afterwards King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend to perform the same duty, that institution was soon neglected (*x*). And from the reign of Henry the Eighth, the task of communicating

(*u*) The "Year Books" commence with the twentieth year of Edw. I., A.D. 1292.

(*x*) In James the Second's time, an order was issued to the Stationers' Company, to the effect that all books concerning the common laws of the realm were to be

[to the public the decisions of the courts has been left to private enterprise. Some of the most valuable of the older private reports are those by Lord Chief Justice Coke (*y*), a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his Reports are so highly esteemed, that they are generally cited without the author's name.

Besides the reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanville and Bracton, Britton and Fleta, Littleton and Fitzherbert, with some others of antient date, whose treatises are cited as authority. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the learned judge before mentioned, Sir Edward Coke; who hath written four volumes of Institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon an excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth (*z*). The second volume is a comment upon many old Acts of Parliament; the third is a treatise on the pleas of the crown; and the fourth an account of the several species of courts.

And thus much for the first ground and chief corner-stone of the laws of England, which is general immemorial

licensed by the Lord Chancellor or the judges, or one of them. (See 1 Ld. Raym. 537; Burr. pref) But the judges afterwards came to a resolution to grant licences no longer.

(*y*) The first eleven parts only were published in Coke's lifetime, at various dates between 1600 and 1615, the twelfth and thirteenth being posthumous.

(*z*) It is usually cited as "Co. Litt." The later volumes are quot as "2 Inst.," "3 Inst.," and "4 Inst.," respectively.

[custom, or common law, from time to time declared in the decisions of the courts; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

II. The second branch of the unwritten law of England consists of *particular* (or *special*) customs affecting only the inhabitants of particular districts (*a*); and a custom of this kind it is usual to designate by the word *custom* simply, to distinguish it from the common law, or the *general* customs already spoken of.

Such is the custom of *gavelkind* obtaining in Kent, and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father succeeds to his inheritance, but all the sons alike (*b*); and that though the ancestor be attainted, yet the heir shall succeed to his estate, without any escheat to the lord (*c*). Such is the custom that prevails in divers antient boroughs, and therefore called *Borough-English*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such also are the customs of particular manors, of which every one hears more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law, and are good only by special usage; though the customs have been also, in some cases, confirmed by Act of Parliament (*d*).]

To this head has also sometimes been referred that branch of the law which comprises the rules relative to

(*a*) Co. Litt. 110 b.; *vide sup.* p. 20.

(*b*) Co. Litt. 140 a.

(*c*) The doctrine of escheat on a conviction for felony is, however, now abolished altogether. (See Forfeiture Act, 1870, s. 1.)

(*d*) See *City of London Case* (1610), 8 Rep. 126; *The King* v. *Bagshaw* (1634), Cro. Car. 347.

[bills of exchange, partnerships, and other mercantile matters, and which body of rules is generally denominated the *custom of merchants*, or the Law Merchant. As its character, however, is not local, nor its obligation confined to any particular district, it cannot with propriety be considered as a special custom in the technical sense to which we now refer (*e*); and it is, in truth, a part of the general law of England (*f*), distinguished specifically or by a separate name, only because it applies, to the particular subjects in question, principles more or less different from those which the common law ordinarily recognizes in other matters (*g*)]. The *usages of particular trades*, where not restrained to some particular locality, must also be excluded, and for the same reason, from the technical name of customs. For, if there be any such usage of immemorial observance, authenticated by judicial decisions, it will form, according to our definition, part of the general law of England. If there be any sanctioned by Act of Parliament, it will constitute part of the statute law. But for the rest, the want of any peculiar *locality* determines these usages to be no customs, and they are consequently no rules of law at all. Yet, as matters of *fact*, these usages are very necessary to be considered; for, as the prevalence of any certain course of dealing among men leads to the presumption that in particular instances they intend to conform to it, the existence of such usages as these may often bear materially upon the question, whether the parties intended to be bound by them (*h*).

[The rules relating to particular or special customs regard either the *proof* of their existence, their *validity*,

(*e*) Co. Litt. 115 b.

(*f*) *Per* Sir Michael Foster, J., *Edie* v. *East India Company* (1761), 2 Burr. 1226; see also *Stone* v. *Rawlinson* (1745), Willes, 561, and *Goodwin* v. *Robarts* (1875), L. R. 10 Exch. 346.

(*g*) The *lex mercatoria*, or *law merchant*, is mentioned in some of our earlier statutes. (See 27 Edw. 3 (1353), st. 2, cc. 8, 19, 20.)

(*h*) *Wigglesworth* v. *Dallison*, (1779) 1 Doug. 190.

[and their usual method of *allowance* when proved. And first, we will consider the rules of *proof*.

As to gavelkind and Borough-English, the law takes particular notice of them; and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto (*i*). All other special customs must be expressly pleaded, and their existence must be shown, not merely that the thing in dispute is within the custom alleged. The trial in both cases (to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to show, "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; unless the same special custom has been before tried, determined, and recorded in the same court (*k*). But, as regards the customs of London, these, so far as they continue, differ from all others in point of proof. For, if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder (*l*); unless indeed it be such a custom as the corporation is itself interested in, as a right of taking toll, for then the law permits them not to certify on their own behalf (*m*).

When a custom is actually proved to exist, the next inquiry is into the *validity* of it; for if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law (*n*). To make a special custom good, the following are necessary requisites:—

1. The custom must have been *used so long, that the memory of man runneth not to the contrary.*] Upon this subject, it is material to recollect, that the time of memory,

(*i*) Co. Litt. 175.

(*k*) Dr. & St. 1, 10.

(*l*) *Appleton* v. *Sloughton*, (1635) Cro. Car. 516; *Westoby* v. *Day*, (1853) 2 E. & B. 605.

(*m*) *Day* v. *Savadye*, (1614) Hob. 85.

(*n*) Litt. s. 212; 4 Inst. 274.

as regards the validity of a right, or (as it is sometimes expressed) the time of *legal* memory, has received a peculiar technical limitation, and refers to so remote a date as the commencement of the reign of King Richard the First (*o*). But this construction, which appears to have been taken, by a rather strained inference, from the wording of an old statute (*p*), is more properly applicable to claims in the nature of *prescription*, or individual claims, than to claims founded on the alleged existence of a local custom. And, even with regard to the former, its importance has been very greatly diminished by the Prescription Act of 1832, which will hereafter be explained (*q*). In cases of claims really founded on local custom, if the commencement of the alleged usage can be proved, it is void as a custom; though, in the absence of such proof, its observance for a long time, and as far back as the evidence reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*r*).

[2. A custom must also have been *continued*. Any interruption would cause a temporary ceasing; revival would give it a new beginning, which would be *within* the time of legal memory, and therefore the custom will be void. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom (*s*). For example, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not exercise the right for ten years; it only becomes more difficult to prove. But if the *right* be anyhow discontinued, even for a day, the custom is quite at an end.

3. A custom must have been enjoyed *peaceably*, and not subject to contention and dispute (*t*). For as customs

(*o*) Co. Litt. 115 a.

(*p*) 3 Edw. I. (Stat. West. I.), c. 39

(*q*) *Post*, bk. ii., pt. i., ch. xxiii.

(*r*) *R.* v. *Joliffe* (1823), 2 B. & C. 54.

(*s*) Co. Litt. 114.

(*t*) *Ibid.*

[owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. A custom must be *reasonable;* or rather, taken negatively, it must not be unreasonable (*x*). Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law (*y*). Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad; for peradventure the lord will never put in his, and then the tenants will lose all their profits (*z*).

5. A custom ought to be *certain* (*a*). A custom that lands shall descend to the most *worthy* of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain. For the value may at any time be ascertained, and, *id certum est quod certum reddi potest.*

(*x*) *Wilkes* v. *Broadbent*, (1744) 1 Wils. 63; *Marquis of Salisbury* v. *Gladstone*, (1861) 9 H. L. C. 692; *Hall* v. *Nottingham*, (1875) 1 Ex. D. 1.

(*y*) Co. Litt. 62 a.

(*z*) Co. Cop. 33.

(*a*) *Selby* v. *Robinson*, (1788) 2 T. R. 758.

[6. A custom, though established by consent, must (when established) be *compulsory;* and not left to the option of every man, whether he will use it or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Lastly, customs must also be *consistent* with each other; one custom cannot be set up in opposition to another (*b*). For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd.] Therefore, if a man should allege that as a fisherman he is entitled, by the custom of a certain place, to dry his nets upon another's land (which, in favour of fishing and navigation, is a reasonable usage), the latter could not allege, in opposition to this, a right by custom to remove the nets when so placed. For these two contradictory customs cannot both be good, nor both stand together (*c*). But one custom may be subordinate to, and therefore controlled by, another custom; in which case both the customs may well stand together. And, where it is possible to do so, customs that are apparently in conflict must be read so as to stand consistently together (*d*).

Next, as to the *allowance* of special customs. No custom can, of course, prevail against the express provisions of an Act of Parliament. But, apart from this restriction, a custom, being in derogation of the general law, must be construed *strictly* (*e*). Thus, by the custom

(*b*) *Aldred's Case*, (1610) 9 Rep. 58 b; *Parkin* v. *Radcliffe*, (1798) 1 Bos. & P. 282.

(*c*) 1 Roll. Abr. 560; *Hickman* v. *Thorne*, (1676) 2 Mod. 104. [The practical result of this rule appears to be, that the party who pleads his custom first, wins, if he can prove it.]

(*d*) *Bateson* v. *Green*, (1793) 5 T. R. 411.

(*e*) *Arthur* v. *Bokenham*, (1708) 11 Mod. 161; *Denn* v. *Spray*, (1786) 1 T. R. 466.

[of gavelkind, an infant of fifteen years may, by one species of conveyance (called a feoffment), convey away his lands in fee simple. But that does not empower him to use any other conveyance; for the custom must be strictly pursued. And yet, if there be a custom that a man may convey his copyhold in fee simple, this will enable him to convey for life, or any other estate; for the less is implied in the greater. And though customs must be strictly, yet they need not in every case be literally construed (*f*). And thus much for the second part of the *leges non scriptæ*, or those particular customs which affect particular persons or districts only.

III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper, at first view, to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing that they are set forth by authority in their Pandects, their Codes, and their Institutes; in their Decrees, Decretals, and treatises. But we do this, after the example of Sir Matthew Hale, because it is most plain, that it is not on account of being a written law, that either the civil law, or the canon law, has any obligations within this kingdom. Such authority as they have is derived from their immemorial acceptance and usage in some particular cases, and some particular courts; though in rare instances this adoption has been expressly recognized by Act of Parliament. They are, therefore, properly part of the *leges non scriptæ*, or customary law.

By the *civil* law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digest (or Pandects) of the Emperor Justinian, and the Novel

(*f*) Co. Cop. 33.

[Constitutions of himself and of some of his successors. And of this body of law, the following is a short and general account.

The Roman Law, founded, first upon the regal constitutions of the antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors, had grown so greatly in bulk, that they were almost impossible to either master or to harmonize. This evil was in part remedied by the private collections of Papirius, Gregorius, and Hermogenes; and then by the Emperor Theodosius the younger, by whose orders there was compiled in 438 A.D., a Code, or methodical collection of all the imperial constitutions then in force. The Theodosian Code was the only book of civil law received as authentic in the western part of Europe till many centuries after (*i*). For Justinian commanded only in the eastern portion of the empire; and it was under his auspices that the now accepted body of civil law was compiled, by Tribonian and other lawyers, and published in the year 533 A.D.

This consists of, 1, The Institutes, which contain the elements or first principles of the Roman law, in four books (*k*); 2. The Digest, or Pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method; 3. A New Code, or collection of imperial constitutions, in twelve books, the lapse of a whole century having rendered the former Code

(*i*) This is at least true of the western part of Europe generally, where the legislation of Justinian was not recognised till the twelfth century. But his Code seems to have been recognised by the Roman Church, much earlier.

(*k*) The Institutes of Justinian are chiefly founded on those of Gaius, and on the fragments of Ulpian. The manuscript of Gaius was discovered accidentally by Niebuhr, in the year 1816, while at work in the library at Verona.

[of Theodosius imperfect (*l*). 4. The Novels, or new Constitutions, posterior in time to the other books, and amounting to a supplement to the Code. These form the body of Roman Law, or the *corpus juris civilis*.

The *Canon* law is a body of ecclesiastical law, relative to matters over which the Church assumes, or formerly assumed, jurisdiction (*m*). It is compiled from the opinions of the antient Fathers, the decrees of General Councils, and the decretal epistles and bulls of the Holy See. All which lay in the same disorder and confusion as the civil law, till, about the year 1140, Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. They embodied the constitutions down to the time of Pope Alexander the Third. The subsequent decrees down to the pontificate of Gregory the Ninth were published under the auspices of that pope, in or about the year 1234, in five books, entitled *Decretalia Gregorii Noni*. A sixth book, called *Sextus Decretalium*, was added by Boniface the Eighth, in or about the year 1298. The Clementine Constitutions, or decrees of Clement the Fifth, were in like manner authenticated in 1317 by his successor John the Twenty-second, who also published twenty constitutions of his own, called the *Extravagantes Joannis;* all which in some measure answer to the Novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes;* and all these together, Gratian's Decree, Gregory's

(*l*) It is called the "New Code," not in reference to the Theodosian code, but to a code which was promulgated by Justinian in the year 529 A.D., and suppressed by him on publication of the New Code, in 534 A.D.

(*m*) A brief account of this system, and its position in England, will be found in a recently published work by Professor Maitland, *Roman Canon Law in the Church of England.*

[Decretals, the Sixth Decretal (or "Sext"), the Clementine Constitutions (or "Clementines"), and the Extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections which, until the Reformation, were received as authentic in this island, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of our own Church and kingdom. The *legatine* constitutions were enacted in *national* synods held under the Cardinals Otho and Othobon, legates of Gregory the Ninth and Clement the Fourth, in the reign of Henry the Third, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry the Third, to Henry Chichele in the reign of Henry the Fifth. They were adopted also by the province of York in the reign of Henry the Sixth (*n*).

Immediately prior to the Reformation of Religion, viz., in the year 1534, it was provided by the Act for the Submission of the Clergy, which was revived in the year 1559 by the Act of Supremacy, that a review should be had of the canon law, *and that, till such review should be made, all canons, constitutions, ordinances, and synodals provincial,* then already *made, and which were not repugnant to the laws, statutes, and customs of the realm, or to the hurt of the king's prerogative, should still be used and executed.* And, inasmuch as no such review has yet been perfected, upon this enactment now depends the authority of the old canon law in England.

As for the canons enacted under James I., in 1603, and at subsequent times, in pursuance of the authority contained in the Act for the Submission of the Clergy, they are, doubtless, binding on the clergy. But, inasmuch

(*n*) Lyndwode's *Provinciale* is the chief work of authority on the provincial constitutions.

[as they have never been confirmed in Parliament, they have been held, upon the principles of law and the constitution, not to bind the laity (*o*).

Postponing, until we come to deal with the jurisdiction of courts, the enumeration of the tribunals, and the cases, in which the civil and canon laws prevail, we may here remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And first, the king's superior courts have the superintendence of all the tribunals in which these laws are applied; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes the sentence so declared to be illegal.

2. The king's superior judges have reserved to themselves the exposition of all such Acts of Parliament as concern either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these Acts of Parliament, or will expound them in any other sense than what the king's judges put upon them, the latter will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts, in the last resort, to the king in council, *i.e.*, to the Judicial Committee of the Privy Council; which proves that the jurisdiction exercised in them is derived from the Crown of England.

And from these three strong marks of superiority it appears beyond doubt, that the civil and canon laws are not a distinct, independent species of laws, but a branch of the customary or unwritten laws of England.

Let us next proceed to the *leges scriptæ*, or written laws of the kingdom, which are the statutes of the realm, made by the King's Majesty, by and with the advice and

(*o*) *Crofts* v. *Middleton* (1737), 2 Atk 650.

[consent of the lords spiritual and temporal, and commons, in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous *Magna Charta* of king John, as confirmed in parliament (9 Hen. III.) (*g*). And we propose to consider, first, the different kinds of statutes, and, second, the rules applicable to their construction (*h*).

First, as to their several kinds. Statutes are either *public* or *private* (*o*). Thus, the statute of 1571 (13 Eliz. c. 10), which prohibits the master and fellows of a college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years or three lives, is a public Act (*p*), being a rule prescribed to spiritual persons in general. But an Act to enable the Bishop of Chester to make a lease to A. B. for sixty years, concerns only the parties and the bishop's successors, and is therefore a

(*g*) A.D. 1225. The statutes from Magna Carta down to the end of Edw. 2—including also some which (because it is doubtful whether to assign them to the reign of Hen. 3, of Edw. 1, or of Edw. 2) are termed *incerti temporis*,—compose what have been called the *Vetera Statuta;* the statutes from the beginning of the reign of Edw. 3 are called the *Nova Statuta*. [The origin of the distinction is probably to be found in the fact, that the earliest printed editions of the statutes did not include those prior to Edw. 3.—E. J.]

(*h*) The methods of citing Acts of Parliament have been various, the antient ones being sometimes called after the name of the place where the Parliament was held that made them (*e.g.*, the Statutes of Merton, of Westminster, of Gloucester), sometimes after their subject (*e.g.*, the Statute of the Staple), sometimes by their initial words (*e.g.*, the Statute of *Quia Emptores*). But the most usual method has long been to cite them by the year of the reigning monarch and the chapter, as, 9 Geo. 2, c. 4; all the Acts of *one session* of parliament taken together making properly but *one statute*. It is now, however, usual to insert in each Act a name referring to its subject-matter and date, by which it may be cited, *e.g.*, "The Public Health Act, 1875." This method of citation has been recognised and extensively adopted by the Short Titles Act, 1896 (59 & 60 Vict. c. 14), repealing (but re-enacting with certain amendments) the Short Titles Act, 1892 (55 & 56 Vict. c. 10).

(*o*) As to this distinction, see Ilbert, *Legislative Methods and Forms*, pp. 48—50.

(*p*) *Holland's Case*, (1597) 4 Rep. 76 a.

[private Act. Again, of private Acts, some are *local*, as affecting particular places only; others *personal*, as confined to particular persons (*q*). Of the first kind, an Inclosure Act is an example; of the second, an Act for a change of name. Formerly, the distinction between public and private statutes was very important; for the courts were bound to take judicial notice of the former, though not of the latter. But now, by the Interpretation Act, 1889, repealing (but re-enacting) the like provision contained in Lord Brougham's Act of 1850 (*r*), every statute made after the year 1850 is to be taken to be public, and judicially noticed as such, unless the contrary is expressly provided by the Act.

Statutes are also sometimes described as *declaratory*, or *remedial*, according to the different nature of their objects or provisions. *Declaratory* statutes are where, the old custom of the kingdom being almost fallen into disuse, or become disputable, the parliament has thought proper, *in perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus, the Statute of Treasons, passed in the year 1352, did not make any new species of treasons, but only (for the benefit of the subject) declared and enumerated those several kinds of offences which before were treason at the common law. *Remedial* statutes are such as supply some defect in the existing law, or redress some abuse with which it is attended;] *e.g.*, the Dower Act of 1833, which introduced various improvements in the law relating to dower. This class of remedial statutes again subdivides into two minor classes; for, of remedial statutes, some are *enabling* or *enlarging*, others *restraining* or *disabling*. Thus, the Settled Land Act, 1882, is an enabling Act, for it is almost wholly occupied in conferring on limited owners powers which they did not previously enjoy. But the Benefices Act,

(*q*) *Richards* v. *Easto*, (1846) 15 M. & W. 244.

(*r*) 13 & 14 Vict. c. 21.

1898, which places stringent restrictions on the exercise of private ecclesiastical patronage, is, undoubtedly, a restraining Act.

Second, the rules applicable to the construction of statutes are principally those which follow:—

1. A statute operates from the time when it receives the royal assent, unless some other time be fixed by the Act itself for the purpose. The rule on this subject was formerly different; for by the old law every Act of Parliament, which had no provision to the contrary, was considered as having been in force retrospectively from the first day of the session in which it was passed, though in fact it might not have received the royal assent, or even been introduced into parliament, until long after that day (*s*). This strange principle, however, though rigidly observed for centuries, no longer prevails; it having been expressly provided by the Acts of Parliament (Commencement) Act, 1793, that, where no other period for commencement is provided by the statute itself, every statute shall be considered as commencing from the date indorsed upon it as the date of its receiving the royal assent. It is now common, in the case of important Acts, for Parliament itself to fix, in the measure, a future date for the commencement of its operation And, when this is the case, the Act is deemed to commence immediately after the expiration of the day previous to that fixed by the measure itself (*t*).

[2. There are three points to be considered in the construction of all remedial statutes—the old law, the mischief, and the remedy; that is, how the common law stood at the making of the Act, what the mischief was for which the common law did not provide, and what remedy the Parliament hath provided to cure this mischief (*u*). For example, before the passing of the

(*s*) *Latless* v. *Holmes*, (1792) 4 T. R. 660.

(*t*) Interpretation Act, 1889, s. 36.

(*u*) *Heydon's Case*, (1584) 3 Rep. 7 b.; 2 Inst. 110.

[statute of 1571, before referred to, that is to say, by the common law, ecclesiastical corporations might have let as long leases as they thought proper, and the mischief was that they let long and unreasonable leases, to the impoverishment of their successors. The remedy applied by that statute was, to make void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now, in the construction of this statute, it was held that leases, though for a longer term, if made by a bishop, were not void during the life of the bishop; because the Act was made for the benefit and protection of the successor. And the mischief was sufficiently suppressed by vacating them after the determination of the interest of the existing incumbent (*x*).

3. A statute which treats of specific classes of persons or things, cannot, merely by reason of the existence of *general words*, be extended to totally different classes of subjects; and, especially, it cannot be extended to persons of a superior rank. Thus, a statute which deals with "deans, prebendaries, parsons, vicars *and others having spiritual promotion*" cannot be extended, by force of these last words, to bishops.]

4. This last rule, however, is confined in its operation to statutes and provisions of a *penal* nature, *i.e.* to such as impose actual punishments upon individuals. These are, in favour of leniency, to be construed strictly. But statutes, having for their object the cure of specific abuses, especially the prevention of frauds, are to be construed liberally, for the achievement of that object. The statute of Elizabeth just mentioned may again serve as an example; for, soon after it was made, the master and fellows of Magdalen College granted certain premises to the queen, her heirs, and successors, on condition that she should convey the same to a certain person named. And it was contended that this conveyance was not

(*x*) *Lincoln College Case*, (1595) 3 Rep. 60.

restrained by the Act; for that, by the general rule of law, the Crown is not bound by a statute unless specially mentioned. This the court admitted to be in many cases true. But as this was a remedial Act, it was adjudged that it should bind the queen (*y*). And, in illustration of the stricter manner in which a penal act must be interpreted, we may refer to Lord Bacon, who said, that if for a certain offence it be enacted that a man shall lose his right hand, and some offender hath had his right hand before cut off in the wars, he shall not lose his left hand; but the crime shall rather pass without the punishment which the law assigns, than the letter of the law shall be extended (*z*). And this distinction applies, not only to remedial and penal statutes properly so called, but also to those of a mixed kind, which contain both remedial and penal provisions (*a*).

5. In the construction of a statute, all other such statutes ought to be taken into consideration as have been made *in pari materiâ*. And this rule applies, whether the prior Acts are referred to in the statute on which the question arises, or not; for they are considered as all forming one continued enactment (*b*). Moreover, one part of a statute must be so construed by another, that the whole may (if possible) stand; *ut res magis valeat quam pereat*. Thus, the enacting, or operative part of an Act, will be controlled by the preamble, or recitals. But a *general* Act will not be treated as repealing the specific restrictions contained in a *particular* Act, unless it expressly repeals them (*c*). And, as regards private Acts of Parliament, although the private Act is obtained by an individual or individuals for his or

(*y*) *Magdalen College Case*, (1615) 11 Rep. 68.

(*z*) Bac. *Maxims*, 12.

(*a*) *Platt* v. *Sheriffs of London*, (1550) Plowd. 36; *Bones* v. *Booth* (1778) W. Bl. 1226.

(*b*) *Jones* v. *Smart*, (1785) 1 T. R. 53.

(*c*) *Thorpe* v. *Adams*, (1871) L. R. 6 C. P. 125; *Clements v. Ward*, (1887) 35 Ch. D. 589; *Ashton-under-Lyne Corp.* v. *Pugh*, [1898], 1 Q. B. 45.

their own individual advantage, while a public Act is obtained by the public, and presumably therefore for the public advantage; yet, although there may be some difference as regards the rules for their construction, once that construction is arrived at, the consequences are precisely the same in the case of each (*d*). Upon the same principles of construction, the title of the Act, and the recitals contained in it (*e*), and the sub-headings under which the sections are sometimes grouped together (*f*), may be fairly considered in arriving at the true construction of the Act; but the marginal notes are no part of the Act (*g*).

6. Where the provision of the statute is general, every thing necessary to make that provision effectual is supplied by the common law. And therefore, when anything is commanded or prohibited by an Act of Parliament, and no remedy for the breach is thereby expressly given, any party who sustains a private injury from the breach is entitled to bring his action for relief. And if the matter be of public concern, the offender shall besides be considered as guilty of a misdemeanor, and liable to indictment accordingly (*h*). The law in this case will be the same, even though the statute, after the prohibition, proceeds by a separate clause to annex a particular pecuniary penalty to the offence if committed, for that will not take away the other remedies (*i*). But where a statute merely inflicts a pecuniary penalty for

(*d*) *Altrincham Union* v. *Cheshire Lines Committee*, (1885) 15 Q. B. D. 597.

(*e*) *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1; *A. G.* v. *Margate Pier Co.*, [1900] 1 Ch. 749.

(*f*) *Hammersmith Rail. Co.* v. *Brand*, L. R. (1869) 4 H. L. 203; *Union Steamship Co.* v. *Melbourne Harbour*, (1884) L. R. 9 App. Ca. 365.

(*g*) *A. G.* v. *G. E. Ry. Co.*, (1879) 11 Ch. D. 460—465; *Sutton* v. *Sutton*, (1882) 22 Ch. D. 513.

(*h*) Bac. Abr. *Statute* (B); 2 Inst. 131, 163; *The Case of the Marshalsea*, (1612) 10 Rep. 75 b.; 2 Hale, P. C. 171; *Rex* v. *Harris*, (1791) 4 T. R. 205.

(*i*) *Rex* v. *Harris*, *ubi sup.*; *Beckford* v. *Hood*, (1798) 7 T. R. 620. [See, however, the restriction suggested by Lord Mansfield in *R.* v. *Robinson*, (1759) 2 Burr. 803.

any act not previously unlawful, and contains no direct prohibitory clause, the only remedy is to proceed for the penalty (*k*).

[7. A subsequent statute may repeal a prior one, not only by express provision to that effect, but by necessary implication. And every statute is a repeal by implication of a preceding statute, so far as it is contrary thereto; for *leges posteriores priores abrogant.* But this is to be understood only when the matter of the later statute is so clearly repugnant to the former, that it necessarily implies a negative. As if a former Act says, that a juror shall have an estate of twenty pounds a year, and a new statute afterwards enacts that he shall have twenty marks; here the latter statute virtually repeals the former. But if the enactments are such that they may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. As if by a former law an offence be indictable at the quarter sessions, and a later law makes the same offence indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, unless the new statute adds express negative words, as that the offence shall be indictable at the assizes, *and not elsewhere* (*l*).

8. It was formerly the rule, that if a statute, repealing another, was itself repealed afterwards, the first statute was revived, without any formal words for that purpose (*m*).] But the rule in this respect was altered by the Lord Brougham's Act of 1850 (*n*), which enacted that, where any Act repealing in whole or in part any former statute

And consider very carefully the cases of *Wolverhampton New Waterworks Co.* v. *Hawkesford*, (1859) 6 C. B. (N.S.) 356, and *Stevens* v. *Chown*, [1901] 1 Ch. 894.]

(*k*) *Rex* v. *Buck*, (1726) 1 Str. 679; *Atkinson* v. *Newcastle, etc. Co.*, (1877) 2 Ex. D. 441; *Ward* v. *Hobbs*, (1878) L. R. 4 App. Ca. 13.

(*l*) *Dr. Foster's Case*, (1614) 11 Rep. 63; *Conservators of the Thames* v. *Hall*, (1868) L. R., 3 C. P. 415; *Fitzgerald* v. *Champneys*, (1861) 2 J. & H. 31.

(*m*) *The Bishops' Case*, (1606) 12 Rep. 7; 4 Inst. 325.

(*n*) 13 & 14 Vict. c. 21.

was itself repealed, such last repeal should not revive the Act or provisions before repealed, unless words were added for that purpose. And, although Lord Brougham's Act has been repealed by the Interpretation Act, 1889, the provisions of the older statute in these respects are re-enacted in the later (*o*). And here we will observe that it has become a very common thing in modern times to pass divers Acts of a temporary duration only, and by subsequent Acts (called Expiring Laws Continuance Acts) to continue their provisions for a further period (*p*).

9. [Acts of Parliament derogatory from the power of subsequent Parliaments bind not. Accordingly, the Treason Act of 1495, which directs that no person for assisting a king *de facto* shall be attained of treason by Act of Parliament or otherwise, holds good only as regards common prosecutions for treason, but does not restrain or clog parliamentary attainders (*q*). For the legislature, being the sovereign power, is and always remains of equal authority.]

These are the several grounds of the law of England, in its original and proper extent. There is a species, however, of unwritten law, to which no reference has yet been made, but which, though long occupying a peculiar and anomalous position, has, by recent legislation, been definitely incorporated into our legal system. This is the body of maxims and rules of procedure known as *Equity*; the origin of which may be stated as follows.

The antient structure of our law (whatever might be its merits in other particulars) was singularly defective in compass, and, for a long time, too rigid in its character to satisfy the wants of a rapidly developing community. It took no account of divers subjects for which it is the duty of the law to provide; and to others it applied

(*o*) S. 11.

(*p*) *e.g.*, 60 & 61 Vict. c. 54; 61 & 62 Vict. c. 47.

(*q*) 11 Hen. VII. c. 1; 4 Inst. 43.

maxims too strict and unbending to satisfy the notions of justice in an advanced state of society. Its remedies also were in some cases inconvenient or limited. For these evils, a successive or progressive amendment of the law by statute would seem to have been the natural remedy. But that was not the course in fact adopted; the law administered between subject and subject, in the antient courts of the realm, being allowed to remain for a long period of our history with very little alteration of a fundamental kind. But new courts were gradually established with a collateral, and in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the common law of England had overlooked or insufficiently regulated. Relief was given, in some cases, from the consequences of the harsher doctrines of that law; and the defects of its judicial methods were in some respects supplied. Thus it happened that the chief of these younger tribunals, the High Court of Chancery, or Court of the Chancellor, gradually acquired a large proportion of the judicial business of the country. Into its jurisdiction fell, among other subjects, the rapidly growing matters of *mortgages*, *trusts*, and *partnerships*. That court became also the proper and regular tribunal to which recourse was had, when the object was either to compel a man to perform specifically a contract into which he had entered, or to cause him to abstain from the commission of some apprehended injury; the common law courts interfering in general only so far as to award *damages* where the breach of contract or the wrong had been already committed. Thus, for some four centuries, there existed in the country, not without occasional friction, two perfectly independent systems of unwritten law, neither owning submission to the other, and administered by distinct tribunals, yet frequently dealing with the same persons and the same subject-matter. In spite of various minor attempts of the legislature to mitigate the incon-

veniences of this anomaly, it remained in force until the year 1875, when, by the Judicature Acts, 1873 and 1875, the two systems came to be administered in the appropriate divisions of a single tribunal, constituted out of the superior courts of justice existing at the date of these Acts, and styled The Supreme Court of Judicature. By the former of these Acts, which came into force on the 1st November, 1875, it was provided, that in all matters in which there was any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity should prevail; and thus, though the distinctive features of the two systems are still clearly traceable, and survive in the popular classifications of the judicial bench and the legal profession, possibilities of conflict are now at an end. Of the important branch of our law which is still known as "Equity," more will be said in a later chapter (*r*).

(*r*) See *post*, bk. v., ch. viii.

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

[The Kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restriction, in these and may other countries; of which it will be proper first to take a review, before we consider the Kingdom of England itself, the original and proper subject of these laws.

Wales had continued independent of England, and in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the Saxons, when the antient and Christian inhabitants of the island retired to its natural entrenchments, for protection against their pagan visitants. But when these invaders themselves were converted to Christianity, and settled into regular governments, they gradually drove the antient Britons into a narrower territory, pursuing them from one fastness to another, and eventually abridging them of their independence. Very early in our history, we find their princes doing homage to the Crown of England; till at length, in the reign of Edward the First, who may justly be styled the conqueror of Wales, the line of their antient princes was abolished, the territory of Wales being then, by a species of feudal resumption, re-annexed to the dominion of the

[Crown of England, or, as the Statute of Wales (1284) (*s*). expresses it, "*terra Walliæ cum incolis suis, prius regi "jure feodali subjecta, jam in proprietatis dominium tota- "liter et cum integritate conversa est, et coronæ regni "Angliæ tanquam pars corporis ejusdem annexa et unita.*" By subsequent statutes, their immunities were still farther abridged: and the finishing stroke to their independence was given by a statute of the year 1536 (27 Hen. VIII. c. 26), confirmed and enlarged by a statute of the year 1543 (34 & 35 Hen. VIII. c. 26), by the combined effect of which the people of Wales were admitted to a thorough communication of laws with the people of England. These statutes enacted (amongst other matters of less importance)—1. That the dominion of Wales should be for ever united to the kingdom of England; 2. That all Welshmen born should have the same liberties as other the king's subjects; 3. That lands in Wales should be inheritable according to the English tenures and rules of descent; 4. That the laws of England, and no other, should be used in Wales; 5. That Wales should be divided into twelve counties or shires, exclusive of the county of Monmouth, which was made one of the counties of England; and 6. That each of such shires, as well as the shire towns of each (save only Merioneth) should send a member to the English Parliament.]

From the time of Henry VIII., therefore, the civil condition of the Principality has differed but slightly from that of England; and it may be remarked, that an Act of Parliament, where England only is mentioned, now includes Wales also (*t*). Wales, however, for a long time had superior courts, called Courts of Great Session, independent of the process at Westminster Hall, and was not visited by the English judges of assize. But, in 1830, by the Law Terms Act, s. 14, the jurisdiction of these Courts of Great Session was abolished, and assizes were

(*s*) 12 Edw. 1.

(*t*) Wales and Berwick Act, 1746, s. 3.

directed to be held in Wales for the trial of all matters civil and criminal, in like manner and form as had been usual for the counties in England.

[The kingdom of *Scotland*, notwithstanding the union of the crowns on the accession of James the Sixth of Scotland and First of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected; which union was judged to be the more easy to be effected, as these kingdoms exhibited at the time of the project a very great resemblance in their institutions. And this is remarked by Sir Edward Coke (*u*), who points out a conformity in many things, not only in the religion and language of the two nations, but also in their antient laws. Nevertheless, many circumstances, among them religious and commercial jealousy, combined to delay the measure so ardently desired by far-seeing statesmen; and it was not until the beginning of the eighteenth century that these difficulties were overcome.

At length, however, the union of the two countries was effected in the year 1706, during the reign of Queen Anne, by a statute commonly called the Act of Union (*x*), by which twenty-five articles were agreed to by the parliaments of both nations, the most considerable of which were as follows :—

1. On the 1st of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England (*y*).

3. The United Kingdom shall be represented by one parliament (*z*).

(*u*) 4 Inst. 345.

(*x*) The Act of Union (6 Ann. c. 11) is sometimes printed as 5 & 6 Ann. c. 8.

(*y*) *i.e.*, by the Act of Settlement (1700).

(*z* There is an appellate jurisdiction in the House of Lords over

[4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed;

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*;

16, 17. The standards of the coin, and of weights and measures, shall be reduced to those of England, throughout the United Kingdom (*a*).;

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England; but all the other laws of Scotland shall remain in force, though alterable by the parliament of Great Britain. Yet with this caution, that while such of these laws as relate to public policy are alterable at the discretion of parliament, such of them as relate to private rights are not alterable but for the evident utility of the people of Scotland;

22. Sixteen peers shall be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the House of Commons (*b*); and

23. The sixteen representative peers of Scotland shall have all the privileges of parliament; and all peers of Scotland shall be peers of Great Britain, ranking next after those of the same degree at the time of the union; and shall have all the privileges of peers, except sitting in the House of Lords and voting on the trial of a peer.

These are the principal of the twenty-five articles of union, which were ratified and confirmed by the Act of Union (6 Anne, c. 11): in which statute there were also

the Scotch courts in civil cases, as to which see the Exchequer Court (Scotland) Act, 1707; the Court of Session Act, 1808; the Appellate Jurisdiction Act, 1876, s. 3. But there is no appeal from the Scottish Court of Justiciary (the criminal tribunal). See *Mackintosh* v. *The Lord Advocate*, (1876) L. R. 2 App. Ca. 41.

(*a*) Art. 17 of the Act of Union was repealed by the Weights and Measures Act, 1878.

(*b*) The number of commoners has since, by the Redistribution of Seats Act, 1885, been increased to seventy-two.

[two Acts of Parliament recited, namely, one of Scotland (*c*), whereby the Church of Scotland, and also the four universities of that kingdom, were established for ever, and all succeeding sovereigns were required to take an oath inviolably to maintain the same; and the other of England (*d*), whereby the Acts of Uniformity of the thirteenth year of Elizabeth and the thirteenth and fourteenth years of Charles the Second (except as the same had been altered by Parliament at that time), and all other Acts then in force for the preservation of the Church of England, were declared perpetual. It was also stipulated, that every subsequent king and queen should take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed; and the Act of Union expressly and particularly enacts that these two Acts "shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles and Act of Union, it is to be observed: 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two Churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the Acts of Uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those Churches, or in the liturgy of the Church of England, would be an infringement of these "fundamental and essential conditions." 4. That the municipal laws of Scotland are

(*c*) 5 Ann. c. 6 (16th Jan. 1707). (*d*) 5 Ann. c. 5 (6 Ann. in Ruff.)

[ordained to be still observed in that part of the island, unless altered by Parliament; and, as the Parliament has not yet thought proper, except in certain instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of the Scottish part of the United Kingdom.] It is, however, to be observed, that Acts of Parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned; and if it is intended to except Scotland, there must be an express proviso to that effect, or the intention of the legislature to except it must be otherwise sufficiently indicated (*e*).

[The town of *Berwick-upon-Tweed* was originally part of the kingdom of Scotland; but it was for a time reduced by King Edward the First into the possession of the Crown of England. During such its subjection, it received from that prince a charter, which, (after its subsequent cession by Edward Balliol to be for ever united to the Crown and realm of England,) was confirmed by King Edward the Third, with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward the First. Its constitution was, however, remodelled and put upon an English footing by a charter of King James the First, and its liberties, franchises, and customs were confirmed in Parliament by statute in the year 1605. Although therefore it hath some local peculiarities, derived from the antient laws of Scotland, yet it is now clearly part of the realm of England; and by the Wales and Berwick

(*e*) *Rex* v. *Cowle*, (1759) 2 Burr. 853

[Act, 1746, where England only is mentioned in any Act of Parliament, the same notwithstanding comprehends and includes the town of Berwick-upon-Tweed.

Notwithstanding the settlement of *Ireland* by King John, the sovereignty there was only entitled the dominion or lordship of Ireland (*f*), and the king's style there was only *Dominus Hiberniæ*, lord of Ireland, till the thirty-third year of King Henry the Eighth, 1543, when that monarch assumed the title of king, which title was also recognized by Act of Parliament in 1543 (*g*). But as Ireland was a distinct dominion, and had Parliaments of its own, it is to be observed, that though the immemorial customs (or common law) of England were made the rule of justice in Ireland also, yet no Acts of the English Parliament, since the twelfth of King John, extended into that kingdom,—unless indeed Ireland was specially named, or was included under words, such as "within any of the king's dominions." And this is particularly expressed, and the reason given, in the Year Books; where it is said,—"Ireland hath a Parliament of its own, and all manner of Courts, as in England, and the Parliament "maketh and altereth laws; and our statutes do not "bind them, because they do not send knights to our "Parliament; but their persons are the king's subjects, "like as the inhabitants of Calais, Gascoigne, and "Guienne, while they continued under the king's "subjection" (*h*).

The original method of passing statutes in Ireland was nearly the same as in England, the chief Governor holding Parliaments at his pleasure, and these Parliaments enacting such laws as they thought proper. But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy-lieutenant in the reign of Edward

(*f*) Stat. Hiberniæ, (1235) 20 Hen. 3.

(*g*) 35 Hen. 8, c. 3.

(*h*) 20 Hen. 6, (1441) Mich. fo. 8, pl. 17; 2 Rich. 3, (1484) Mich. fo. 12, pl. 26.

[the Fourth (*i*), a set of statutes was enacted in the tenth year of Henry the Seventh, Sir Edward Poynings being then Lord Deputy (whence these statutes are called Poynings' laws). By one of these (*k*), in order to restrain the power as well of the deputy as of the Irish Parliament, it was provided,—1. That, before any Parliament should be summoned or holden, the chief governor and council of Ireland should certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the Acts proposed to be passed therein; and 2. That after the king, in his council of England, should have considered, approved, or altered the said Acts or any of them, and certified them back under the great seal of England, and should have given licence to summon and hold a Parliament, then the same should be summoned and held; and therein the said Acts so certified, and no other, should be proposed, received, or rejected. But as this statute precluded any laws from being proposed but such as were preconceived before the Parliament was in being, it was afterwards provided by the Irish statute of 3 & 4 Ph. & M., c. 4, that any new propositions might be certified to England in the usual form, even after the summons and during the session of Parliament. Still, however, there was nothing left to the Parliament in Ireland, save a bare negative or power of *rejecting*, not of proposing or altering any law. But the usage afterwards was, that bills were often framed in either House, under the denomination of "heads for a bill or bills," and in that shape were offered to the consideration of the lord lieutenant and privy council. But none of "Poynings' laws" could be repealed or suspended, unless the bill for that purpose, before it was certified to England, had been approved by *both* Houses (*l*).

(*i*) Irish Stat. 10 Hen. 7, (1495) c. 23.

(*k*) Irish Stat. 10 Hen. 7 (1495) c. 4, expounded by 3 & 4 Ph. & M. (1556), c. 4.

(*l*) Irish Stat. 11 Eliz. (1569) st. 3, c. 8.

[By another of "Poynings' laws" (*m*), it was enacted that all Acts of Parliament *before* made in England, should be of force within the realm of Ireland (*n*). But Ireland was still not bound by Acts of the English Parliament, passed *after* that statute, which did not specially name or refer to Ireland (*o*); although where Ireland *was* particularly named or referred to, or was included under general words, Ireland was bound by all such Acts of Parliament, because Ireland was a dependent state. And, forasmuch as this condition of dependence was disputed by the Irish nation, it was therefore affirmed and declared, in the year 1719, by the so-called Declaratory Act.]

The dependence of Ireland upon England being thus established, that dependence extended also to its courts of justice; wherefore a writ of error (in the nature of an appeal) lay from the Court of King's Bench in Ireland to the Court of King's Bench in England (*p*). And an appeal from the Court of Chancery in Ireland lay immediately to the English House of Lords, it being expressly declared by the same statute of 1719, that the peers of Ireland had no jurisdiction either to affirm or to reverse any judgments or decrees whatsoever of the courts in Ireland (*q*). But this assertion was strongly resented by Irish feeling; and, by two statutes of the years 1782 and 1783 (*r*), its repeal was at last effected, the Parliament and courts of Ireland having (by the latter statute) re-acquired their independence in all matters of legislation and judicature in that country, which independence they retained until the Act of Union, in the year 1800, constituted Ireland an integral portion of the United Kingdom.

(*m*) 10 Hen. 7, (1495) c. 22.

(*n*) 4 Inst. 351.

(*o*) 12 Rep. 112; 21 & 22 Geo. 3, (1781), c. 48 (Yelverton's Act).

(*p*) This was law in the time of Hen. VIII., as appears by the antient book, intituled *Diversity of Courts*, c. *Bank le Roy*.

(*q*) 6 Geo. 1, c. 5, s. 2.

(*r*) 22 Geo. 3, c. 53; 23 Geo. 3, c. 28 (The Irish Appeals Act, 1783).

The most important provisions of this last Act were as follows:—

1. That the kingdoms of Great Britain and Ireland should, on the 1st day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland;

2. That the succession to the Crown of the United Kingdom should continue the same as the succession to the Crown of Great Britain and Ireland before the union;

3. That there should be one Parliament, styled the Parliament of the United Kingdom of Great Britain and Ireland;

4. That twenty-eight peers of Ireland, elected for life by the peers of Ireland, should sit in the House of Lords of the United Kingdom; that one hundred (now one hundred and three) commoners should sit in the House of Commons of the United Kingdom on the part of Ireland, any peer of Ireland not elected one of the twenty-eight being competent to serve in the House of Commons of the United Kingdom for any county, city, or borough of Great Britain, but (while so serving) not being entitled to any privilege of peerage; and that all the peers of Ireland, (except those who were members of the House of Commons,) should have all the privilege of peerage as fully as the peers of Great Britain, the right of sitting in the House of Lords only excepted;

5. That the subjects of Great Britain and Ireland should all be entitled to the same privileges with regard to trade and navigation;

6. That the future expenditure of the United Kingdom should be defrayed in such proportion as the Parliament thereof should from time to time deem just and reasonable; and,

7. That all the laws and courts of each kingdom should remain the same as already established, subject to such alterations and regulations as circumstances might appear to the Parliament of the United Kingdom to require; all

writs of error, nevertheless, and all appeals which might, before the union, have been decided in the House of Lords of either kingdom, being henceforth decided in the House of Lords of the United Kingdom only.

Since the union of 1801, all acts of the united Parliament extend of course to Ireland, whether that portion of the United Kingdom be mentioned or not, unless Ireland be expressly excepted, or the intention to except it be otherwise plainly shown. And many Acts of Parliament extend to Ireland exclusively, *e.g.*, the Judicature (Ireland) Acts, 1877, 1888, and 1897, the Solicitors (Ireland) Act, 1898, and the Local Government Act, (Ireland) 1898.

[With regard to the other adjacent islands which are subject to the British Crown, some of them (as the Isles of Wight, Portland, Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as forming part of the kingdom of England. But there are some which require a more particular consideration.

The Isle of Man is a territory distinct from England, and is, in general, governed, not by the laws of England, but by Acts of its own local legislature, called the *Court of Tynwald*; neither does any Act of Parliament extend to the Isle of Man, unless it be particularly named therein.

It was formerly a subordinate feudatory kingdom, subject to the Kings of Norway; then to Kings John and Henry the Third of England; afterwards to the Kings of Scotland; and then again to the Crown of England. At length we find King Henry the Fourth claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley, by letters patent 7 Hen. IV. (*t*). In his lineal descendants it continued

(*t*) Selden, *Tit. Hon.* 1, 3.

[for eight generations, till the death of Ferdinando, Earl of Derby, A.D. 1594; when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother. Upon which, and a doubt that was started concerning the validity of the original patent (*u*), the island was seized into Queen Elizabeth's hands, and afterwards various grants were made of it by King James the First. All which being expired or surrendered, it was granted afresh in 7 Jac. 1 to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said Earl and his issue male. On the death of James Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of "king" had long been disused, the Earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting to or dissenting from laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts at Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the King of Great Britain in council (*x*). But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (affording as it did a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the Treasury by a statute (12 Geo. I. c. 28) to purchase the interest of the then proprietors for the use of the Crown. And this purchase was at length completed in the year 1765; and was confirmed by the Isle of Man Purchase Act of that year, whereby the whole island and all its dependencies, so granted as aforesaid, (except the landed property and

(*u*) Camden, Eliz. A.D. 1594.

(*x*) *Christian* v. *Corren*, (1716) 1 P. Wms. 329.

[some other rights of the Atholl family,) became inalienably vested in the Crown.

The Channel Islands, namely, Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the Crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book intituled *Le Grand Coustumier*. The King's writ, or process from the English courts, is in ordinary cases of no force in these islands. But his commission is; and the writ of *habeas corpus* also is (*y*). These islands are not bound by common Acts of the English Parliament, unless particularly named. All causes are originally determined by their own officers, the bailiffs and jurats of the islands (*z*); but an appeal lies from their decision to the Crown in Council.]

It may here be remarked that the Isle of Man and the Channel Islands, though not included in the United Kingdom, are yet, by the provisions of the Interpretation Act, 1889, comprised in the expression "the British Islands," when it occurs in an Act of Parliament.

In addition to these adjacent islands, there are now many more distant possessions or dependencies of the British Crown in various quarters of the globe. These are all now technically called *colonies*; and whenever in the course of what follows that term is used, it is to be understood as referring to them all. [Colonies are either gained by conquest or cession, or else they are acquired by right of occupancy only, that is, by finding them desert and uncultivated, and peopling them from the mother country.

In conquered or ceded countries which have already laws of their own, those laws remain in force until

(*y*) The Habeas Corpus Acts, 1679 and 1816; *Carus Wilson's Case*, (1845) 7 Q. B. 984.

(*z*) *In re the Jersey Jurats*, L. R. (1866) 1 P. C. 94; *Williams* v. *Stevens*, (1866) *ib.* 352.

[changed by competent authority (*a*); the common law of England, as such, having no authority there. But it has been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force (*b*). But this must be understood with very many and very great restrictions. The colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, are neither necessary nor convenient for an infant colony, and therefore are not in force there (*c*).] In colonies of every description, every act of government is done in the name of the Crown, or in the name of the Governor, who acts as the deputy of the Crown. The right of legislation, too, is in some cases vested in the Crown. For any colony which has been acquired by conquest or cession is subject to such laws as the Crown in Council may impose (*d*); but this rule does not extend to colonies acquired by occupancy, for in these the Crown has no such legislative power. The Crown in Council may, nevertheless, in any colony, however acquired, direct the Governor to summon a representative assembly from among the inhabitants themselves, for the purpose of interior legislation. And it is an established principle, that a conquered or ceded colony, to which the Crown has thus once granted a representative legislature, is no longer subject to legislation by the Crown (*e*).

Such being the nature of the authority of the Crown in

(*a*) *Campbell* v. *Hall*, (1774) Cowp. 204; following *Rex* v. *Vaughan*, (1769) 4 Burr. 2500.

(*b*) *Blankard* v. *Galdy*, (1693) Salk. 411; S. C. 4 Mod. 215.

(*c*) *New Zealand Loan Co.* v. *Morrison*, [1898] A. C. 349.

(*d*) *Calvin's Case*, (1608) 7 Rep. 17 b; *Campbell* v. *Hall*, (1774) Cowp. 211.

(*e*) *Campbell* v. *Hall*, *ubi sup.*

our colonial possessions (as to which authority we may add that it is exercised through the agency of a principal secretary of state, called the Secretary of State for the Colonies), it is almost superfluous to remark, that they are all, under all circumstances and whatever may be their political constitution, subject to the legislative control of the British Parliament. This control at one time extended even to *taxing* the colonies. But the exercise of this control was strenuously opposed by, and led eventually in 1782 to the independence of, the United States of America (*f*). And having been first given up in 1778 (*g*) as regards America, it has since been abandoned with regard to all our colonial possessions. But the general right of the mother country to legislate for the colonies is (excepting in the matter of taxation) still preserved, and is expressly recognized in the Colonial Laws Validity Act, 1865 (*h*).

Though it is competent to Parliament to legislate for the colonies, yet a colony is not considered as affected by Acts of Parliament passed after its acquisition, and while it is subject to other legislative authority, unless it be referred to in the Act by name, or by general description, such as "the colonies"; or unless the Act be, in its nature, obviously intended to affect all our possessions wherever situate. In the case of a colony acquired by occupancy, Acts of Parliament, passed before its acquisition, come into force immediately upon that event, as part of the general law of England; at least as to all provisions not unsuitable to the social circumstances of the colony. But a colony acquired by conquest or cession is not in general affected by statutes of the United Kingdom passed before its acquisition.

Such being the general principles of law applicable to colonies, we may next advert to the actual constitutions

(*f*) 22 Geo. 3, c. 46; and the Treaty of Paris, 3rd September, 1783.

(*g*) 18 Geo. 3, c. 12.

(*h*) 28 & 29 Vict. c. 63.

of those which at present belong to the British Crown. These fall into two great groups, viz., *Crown* colonies, and *self-governing* colonies. In the former group the government may take many forms. In some cases, the Governor is virtually an autocrat. In others, he is assisted and controlled by an Executive Council, or by Executive and Legislative Councils, nominated by him with the approval of the Home Government. In the highest type of Crown colony, there is even a representative legislature. But the feature common to all forms of Crown colony government is, that the executive government, including the appointment of all Crown officials, is in the hands of the Colonial Office, and not of the inhabitants of the colony. On the other hand, in the *self-governing* colonies (or colonies enjoying Responsible Government), not only are there representative legislatures, usually divided into two Houses; but the choice of officials, and the conduct of executive business, is almost entirely in the hands of Ministers representing the victorious party in the Lower House of the colonial Parliament, appointed by the Governor on the same principles as those which guide the Crown in appointing the Ministry of the day in the United Kingdom. But the statutes and ordinances of all these colonial legislatures require the assent of the Governor as representing the Crown, before they can come into even temporary operation; and they are liable to be afterwards annulled by a notification from this country of their having been *disallowed* by the Crown in Council (*i*). And now, by the Colonial Laws Validity Act, 1865, passed "to remove doubts as to the validity of colonial laws," it has been declared, that any colonial law *repugnant* in any respect to the provisions of any Act of Parliament extending to the colony, shall be void and inoperative to

(*i*) Clark, *Colonial Law*, 41. [In a few special cases the Bills ought to be reserved for the signification of His Majesty's pleasure, even before coming into conditional operation. But the rule is often neglected. See Colonial Acts Confirmation Act, 1894.—E. J.]

the extent of such repugnancy (*k*); but that no colonial law, *unless* so made void and inoperative, is to be deemed to be repugnant to the law of England (*l*).

Thus much as to our colonies in general. But there is one dependency of the British Crown, which, by reason of its magnitude, and its peculiar character, requires a special mention. This is the great province of British India.

In the year 1708, the two rival associations which had existed in England for the purposes of the East India trade, were consolidated into one (*m*), with the exclusive privilege of trading to the East Indies and other specified places (*n*), a privilege repeatedly renewed by successive subsequent grants (*o*). This new body was originally incorporated by the name of "The United Company of Merchants of England trading to the East Indies"; but convenience attached to it the shorter appellation of "The East India Company," which afterwards became by express provision its proper legal style. In the progress of its well-known history, it crushed upon the Indian Peninsula the power of the rival settlers from France and Holland; and, though first instituted for purposes merely commercial, its policy, as administered by the Governors whom it sent out, gradually led to the acquisition of immense territorial dominions, by which it became effectively (though subject to the undoubted supremacy of the British Crown) the ruling power in India. The unexampled grandeur of this company rendered the regulation of its affairs, for a long period of our history, an object of the highest interest and importance to the British nation. In the year 1773, and again in 1780, the constitution of the company was modified by statutes known as the Regulating Acts (*p*). In 1784, its administration

(*k*) 28 & 29 Vict. c. 63, s. 2.
(*l*) *Ibid.* s. 3.
(*m*) 6 Ann. c. 71, s. 13.
(*n*) 9 & 10 Will. 3, c. 44, s. 81.
(*o*) The Government of India Act, 1833, s. 111.
(*p*) The East India Company Acts, 1772 and 1780.

of the East was brought under the superintendence of the executive government at home, by the establishment of the Board of Commissioners for the affairs of India, called the "Board of Control" (*q*). Still, however, the commercial monopoly of the company remained entire; but in 1813, it was provided, by the Act then passed for the temporary renewal of the company's charter, that the trade from all places except China, and in all commodities except tea, should be thrown open (under certain restrictions and limitations) to every subject of the realm (*r*). The expediency being once recognized of admitting the capital of our private merchants to a free participation in every branch of the Indian traffic, an arrangemnnt was accordingly made with the company for that purpose in 1832. And this arrangement was carried into effect by the Government of India Act, 1833, which abolished the exclusive trading rights of the company (*s*). And, though the territories and other property of the company, with the exception of St. Helena (which was by the same statute vested in the Crown), were allowed to remain under the government of the company, they were declared to be "in trust" only for "His Majesty, his heirs and successors" (*t*). The government was committed to a Governor-General and a board of councillors, who, under the style of "The Governor-General of India in Council" (*u*), were invested with a superintending authority over all the local Indian governments, called Presidencies, in all points relating to their civil and military administration (*x*), and with power to make laws for all persons, whether British or native, throughout the whole of the territories, and for all servants of the company within the dominions of allied states (*y*), subject, however,

(*q*) The East India Company Act, 1784; 26 Geo. 3, (1786) c. 16.

(*r*) The East India Company Act, 1813, s. 7.

(*s*) 3 & 4 Will. 4, c. 85, s. 3.

(*t*) *Ibid.* ss. 1. 2.

(*u*) S 39

(*x*) S. 65.

(*y*) S. 43.

to a power in the Court of Directors to disallow any law so made (*z*), and subject also to the superintending and paramount authority of the Imperial Parliament (*a*).

Under the Government of India Act, 1833, the territories of India were to continue under the control of the East India Company until 30th April, 1854; and by the Government of India Act, 1853, these territories, even after that time, were to remain under the same government until Parliament should otherwise provide. Such new provision, however, was in fact shortly afterwards made, being hastened by circumstances of an unexpected and disastrous kind, namely, the Sepoy mutiny of 1857, which was not suppressed till the close of 1858. It then appeared to Parliament, that the time had arrived for a more effectual administration of India. By the Government of India Act, 1858, it was accordingly provided, that all the powers and rights vested in the East India Company in trust as aforesaid should cease, and should become vested in Her Majesty and be exercised in her name; and shortly afterwards (*i.e.*, in 1874), the company was dissolved (*b*).

The Government of India Act, 1858, just referred to, after providing for the direct sovereignty of the British Crown in India (*c*), enacted also specifically the determination of the functions and powers theretofore vested in the Court of Directors and Court of Proprietors in relation to the government of India (*d*), and the abolition of the Board of Control (*e*). The Act also contained a great variety of provisions as to the manner in which the business to be transacted in this country, in relation to the Indian Government, and the correspondence therewith, should in future be conducted (*f*). The general effect of these provisions was:—that such business and correspondence should be conducted by a Principal Secretary

(*z*) S. 44.
(*a*) S. 81.
(*b*) 36 & 37 Vict. (1873), c. 17, s. 36.
(*c*) 21 & 22 Vict. c. 106 s. 1.
(*d*) S. 60.
(*e*) S. 61.
(*f*) S. 19.

of State in Council (*g*) ; that such council, of which the Secretary of State was to be president, with a power himself to vote (*h*), should consist of fifteen members, under the style of the "Council of India," by way of distinction from the "Council of the Governor-General" already established in that country (*i*) ; that the members of the council should be salaried (*k*), and should hold office during good behaviour (*l*), but should not be capable of sitting or voting in Parliament (*m*).

With a view to the recognition of the transfer of government from the East India Company to Her Majesty effected by the statute of 1858, above mentioned, and for divers other weighty reasons of state, it was subsequently thought expedient, that an appropriate alteration should take place in the style and titles appertaining to the Imperial Crown of the United Kingdom and its dependencies. Accordingly, under the Royal Titles Act, 1876, Her Majesty Queen Victoria, in the year 1876, added to her previous style and titles the title of "Empress of India."

[NOTE.—The student who desires to know more of the government of the colonial possessions of the British Crown, and of the relations between the Home Government and the colonial authorities, should consult two very valuable works recently published by the Clarendon Press, viz. : *The Government of India*, by Sir Courtenay Ilbert, and *British Rule and Jurisdiction Beyond the Seas*, by the late Sir Henry Jenkyns.]

(*g*) Ss. 3, 21.
(*h*) S. 21.
(*i*) S. 7.
(*k*) S. 13.
(*l*) S. 11.
(*m*) S. 12.

SECTION V.

OF THE KINGDOM OF ENGLAND ITSELF.

[We come now to consider the kingdom of England itself; the direct and immediate subject of those laws concerning which we are to treat in the ensuing Commentaries. And this comprehends, not only Wales and Berwick, of which enough has been said, but also part of the sea. The main or high seas are, in one sense, part of the kingdom of England proper; for thereon our courts of admiralty have jurisdiction, although they are not subject to the common law. The main sea begins at the low water-mark. But between the high water-mark and the low water-mark, where the sea ebbs and flows, the common law and the admiralty have alternate jurisdiction; the common law having jurisdiction on the land, when it is an ebb, and the admiralty on the water, when it is full sea (*n*).

The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

I. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops (*o*); and every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and every rural deanery into parishes (*p*).

(*n*) Finch, *Discourse of the Law*, 78; *Constable's Case*, (1601) 5 Rep. 107 a.

(*o*) Bishops are here termed "suffragan" (a word signifying *deputy*) in relation to their archbishop (Co. Litt. by Harg. 94 a, note (3)); and coadjutor bishops (of a more recent creation) are also called "suffragan bishops," in relation to the principal bishop of their diocese, *vide post*, bk. iv. pt. ii. ch. i.

(*p*) Co. Litt. 94.

[A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein (*q*). How antient the division into parishes is may at present be difficult to ascertain; for it seems to be agreed on all hands, that, in the early ages of Christianity in this island, parishes were unknown, or, at least, signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion (*r*).

It seems, however, to be the better opinion, that the division of the land into parishes was largely due to the organizing energy of Theodore of Tarsus, who was Archbishop of Canterbury from 668—693 A.D. (*s*). At any rate, we find the distinction of parishes, and of mother-churches, so early as in the laws of King Edgar, about the year 960. For, whereas before that time the consecration of tithes was in general *arbitrary*, every man paying his own to what church or parish he pleased, it was ordered by these laws that "all tithe be paid to the mother-church to which the parish belongs" (*t*). However, if any thane, or great lord, had a church within his own

(*q*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*"—*Jeffery's Case*, (1589) 5 Rep. 67 a. For purposes of an Act of Parliament, "parish" now means a place having (or capable of having) a separate overseer or poor rate (Interpretation Act, 1889, s. 5). But see Local Government Act, 1893, s. 75.

(*r*) Selden, *Tithes*, 9, 4; 2 Inst. 646.

(*s*) Stubbs, *Constitutional History*, I. p. 227.

(*t*) *Laws of Edgar*, II. 1 (1), in Liebermann, *Gesetze der Angelsachsen*, p. 197. (It is, however, very doubtful whether the term "parish" is here anything more than a late version of an old Saxon word, meaning simply "district." —E. J.)

[demesnes, distinct from the mother-church, then, provided such church had place of burial belonging to it, he might allot one-third of his tithes for the maintenance thereof. But, if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the mother-church (*u*).

The division of the kingdom into parishes happened probably not all at once, but by degrees; and it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of townships, or as they were later called, manors. For it very seldom happens that a manor or township extends over more parishes than one, though there are often many manors or townships in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, they obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general. This tract of land, the tithes whereof were so appropriated, formed a distinct parish, which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situated in forest and desert places, or for other now

(*u*) *Ibid.* 1 (2), 2.

[unsearchable reasons, were never united to any parish, but remained *extra-parochial.* The sea-shore is *primâ facie* extra-parochial, as is also the bed of a public navigable river. In all extra-parochial places the tithes are by immemorial custom payable to the king, in trust and confidence that he will distribute them for the general good of the Church (*x*).] Recent legislation has provided, in view of the great increase of population in certain centres, for the subdivision of antient ecclesiastical parishes, either into districts subordinate to the old Church, or into completely independent parishes (*y*). And thus much for the ecclesiastical division of this kingdom.

II. [The ancient civil division of the territory of England is into counties, and of counties into hundreds, and of hundreds into tithings or townships. As to the tithings, they were so called, from the Saxon, because *ten* freeholders with their families composed one. These families all dwelt together, and were sureties (or free pledges) to the king, for the good behaviour of each other; and, if any offence was committed in their district, they were bound to have the offender forthcoming (*z*). And therefore antiently no man was suffered to abide in England, above forty days, unless he were enrolled in some tithing or decennary (*a*). One of the principal inhabitants of the tithing was annually appointed to preside over the rest, being called the tithing man, the headborh, (words which speak their own etymology,) and in some counties, the borsholder, or borh's-ealdor, being supposed the discreetest man in the borh or tithing (*b*).

(*x*) 2 Inst. 647; *Wright* v. *Wright*, (1596) Cro. Eliz. 512.

(*y*) The New Parishes Acts, 1843—1884. (See *post*, bk. iv. pt. ii. ch. iv.)

(*z*) Our chief information about the tithing or frankpledge comes from the so-called *Laws of Edward the Confessor*, a law book of the 12th century. It is very doubtful whether the tithing is (a) older than the Conquest, (b) a local unit at all. The *Laws of Edward the Confessor* are printed in Schmid, *Gesetze der Angelsachsen.*—E. J.

(*a*) Mirr. ch. 1, s. 3.

(*b*) *Laws of Edward*, 20 (3).

[Townships, towns, or vills, were antiently of the same significance in law, each of them having had originally a church with sacraments and burials, though that seems to be rather an ecclesiastical than a civil distinction (*c*); but the word *town* is now become a generical term, comprehending under it several species and varieties (*d*).] Taken in this wide sense, towns are distinguished from each other as being either corporate or not corporate. In the former, the ratepaying inhabitants are created by royal charter a legal personality commonly designated a *municipal corporation*, of the powers of which we shall have much to say in a later volume. Again, there are market-towns, or towns entitled to hold markets, and there are others which have not that franchise; and, lastly, towns are either cities, boroughs, or common towns. The title of "city" is in this country merely traditional or honorary, carrying with it no special powers. A borough was anciently a fortified place, then a town which exercised certain privileges or franchises, *e.g.* the right to manage its own affairs, or to send members to Parliament. At the present day a true borough is a town which is incorporated by charter for purposes of self-government (*e*). But an urban constituency which sends members to parliament is frequently called a "parliamentary borough."

Apart, however, from these privileged cases, there has existed, from antient times, the ordinary township or vill, which is, even now, despite recent changes, the basis of the English system of local government. For a long period, during the Middle Ages, its very existence was obscured by the ecclesiastical organisation of the parish, which had obtained such a powerful hold upon it,

(*c*) Co. Litt. 115 b.

(*d*) *Elliott* v. *South Devon Railway Company*, (1848) 2 Exch. 729; *London and South Western Railway Company* v. *Blackmore*, (1870) L. R. 4 H. L. 610.

(*e*) Interpretation Act, 1889, s. 15.

and absorbed so many of its functions. But, with the growth of the poor law system in the seventeenth and eighteenth centuries, the secular unit, with its overseers and relieving officers, began once more to reappear under the names of "poor law parish," or "civil parish." And, although the tradition of the Middle Ages was still strong enough to enable the ecclesiastical officers (the incumbent and churchwardens) and the ecclesiastical assembly (the vestry) to claim much of the control, even in secular affairs, yet the increasing difficulties of the situation gradually led to a complete severance of the ecclesiastical and secular parishes, which are now, in many cases, totally different in area (*f*). The three great steps by which this result was achieved were (1), the Public Health Act, 1875, which, virtually, constituted each urban civil parish (outside the Metropolitan area), a separate "urban district"; (2), the Local Government Act, 1894, which conferred certain powers of self-government upon rural civil parishes; and (3), the London Government Act, 1899, which converted the London civil parishes into municipal boroughs.

As ten families of freeholders made up a township or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families (*g*). The hundred was governed by a high constable or bailiff; and formerly there was regularly held in it the hundred court for the trial of causes, though that court has now fallen into disuse. Moreover, the hundred was answerable for the riotous demolition of churches, buildings, and machinery, and for plunder of wreck. But now, under the Riot (Damages) Act, 1886 (*h*), the compensation for damage to buildings or other property occasioned by riots is payable out of the police rate; and

(*f*) The period of struggle is represented by such statutes as the Vestries Act, 1818 (Sturges Bourne's Act), the Vestries Act, 1831 (Hobhouse's Act), and the Vestries Act, 1853.

(*g*) The numerical inferences drawn from the names are extremely doubtful.—E. J.

(*h*) 49 & 50 Vic. c. 38.

by the Local Government Act, 1888, the county council is made the local authority for the execution of the Act. The liability for plunder of wreck was likewise, by the Merchant Shipping Act, 1894, s. 515, transferred to the police district. But the liability for the maintenance of roads still occasionally falls on the hundred. In some of the more northern counties these hundreds are called wapentakes.

[An indefinite number of hundreds make up a county or shire. Shire is a Saxon word which signifies merely a division; but a county (*comitatus*) is plainly derived from *comes*, the count of the Franks, that is, the earl or alderman, (as the Saxons called him,) of a shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve or shire-reeve, signifying the officer of the shire, upon whom the whole civil administration gradually devolved. In some counties there is an intermediate division between the shire and the hundred, as lathes in Kent and rapes in Sussex, each of them containing about three or four hundreds a-piece (*i*). And these had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings, which were antiently governed by trithing-reeves (*k*). These trithings still subsist in the large county of York; where, by an easy corruption, they are denominated Ridings,—the North, the East, and the West Riding.]

It seems probable that the realm was originally divided into counties, with a view to the more convenient administration of justice; for the judicial business of the kingdom was in early times chiefly despatched in local

(*i*) For some purposes, connected chiefly with magisterial business, certain counties are split up into *divisions*, a principle adopted for general purposes by the Local Government Acts, 1888, 1894.

(*k*) *Laws of Edward*, c. 31 (Schmid, *Gesetze*).

courts, held in each different county, before the sheriff, as its principal officer. And as regards crime, the trial is, as the general rule, still conducted in the county wherein the offence is alleged to have been committed; the trial taking place either before the judges and commissioners of assize, on their periodical circuits, or else before the justices of the peace for the county at their quarter sessions. But, under the provisions of modern Acts of Parliament, counties may be united together for the trial of prisoners (*l*).

Another important object, connected with the distribution into counties, is that of parliamentary representation. Every county used to send to the House of Commons its own members, called knights of the shire, who represented their respective counties, as the borough members their respective towns. Latterly, the larger counties have been subdivided, each portion forming (so far as this purpose is concerned) a separate county, and sending its separate representative. And this subdivision of counties has been recently carried to a great length, and boroughs also have been subdivided, by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23).

For the object of local taxation, too, the division into counties is of practical effect and importance. For, as each parish is subject to a rate for the relief of the poor, so is every county subject to a county rate, which is directed to be levied on the occupiers of land within the county, and is applicable for many miscellaneous purposes, such as the maintenance of the rural police, lunatic asylums, gaols, bridges, and the like. And, finally, new elective county councils have been provided, by the Local Government Act, 1888, for the administration of local affairs, the working of which will hereafter be explained (*m*).

[Three of these counties, viz., Chester, Durham, and

(*l*) Winter Assizes Act, 1876; Spring Assizes Act, 1879.

(*m*) See *post*, bk. iv., pt. iii.

[Lancaster, are called counties *palatine*. The two former are such by prescription or immemorial custom (*n*), which dates back at least to the Norman conquest. Lancaster was created a county palatine by King Edward the Third, in favour of Henry Plantagenet, Duke of Lancaster, whose heiress being married to John of Gaunt, the king's son, the franchise was afterwards greatly enlarged and confirmed in Parliament, to honour John of Gaunt himself (*o*). Counties palatine are so called *a palatio*, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had formerly in those counties *jura regalia* as fully as the king in his palace (*p*). That is to say, they might pardon treasons, murders, and felonies; they appointed judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (*q*). And indeed, by the antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried; in a court leet, *contra pacem domini;* in the court of a corporation, *contra pacem ballivorum;* and in the sheriff's court or tourn, *contra pacem vice-comitis*. These palatine privileges, so similar to the regal independent jurisdictions usurped by the great barons on the Continent, during the weak and infant state of the first feudal kingdoms in Europe, were in all probability originally granted to the counties of Chester and Durham, because these counties bordered upon inimical countries, Wales and Scotland; in order that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire (the latter now united with

(*n*) Seld. *Tit. Hon.* 2, 5, 8.
(*o*) *Case of Duchy of Lancaster*, (1562) Plowd. 212.
(*p*) Bracton, L. 3, ch. 8, s. 4.
(*q*) 4 Inst. 205.

[Northumberland); but these were abolished by Parliament, the former in the twenty-seventh year of Henry the Eighth, and the latter in the fourteenth year of Elizabeth. In the twenty-seventh year of Henry the Eighth, moreover, the powers before mentioned of the owners of the three remaining counties palatine were abridged, the reason for their continuance having in a manner ceased (*r*);] and in modern times, alterations have taken place in regard to the administration of justice in the counties palatine, which have, for the most part, assimilated them in that respect to the rest of England. Thus, by the Law Terms Act, 1830, the jurisdiction of the court of session of the county palatine of Chester was abolished, and that county was subjected in all things to the jurisdiction of the superior courts at Westminster. And by the Judicature Act, 1873, the jurisdictions of the Court of Common Pleas of Lancaster and of the Court of Pleas of Durham were respectively transferred to the High Court of Justice by that Act established (*s*). [None of the counties palatine any longer remain in the hands of subjects. For the earldom of Chester was united to the Crown by Henry the Third, and has ever since been one of the titles of the monarch's eldest son; the palatine jurisdiction of Durham was taken from the Bishop of Durham by the Durham (County Palatine) Act, 1836 (amended by the Durham County Palatine Act, 1858), and was vested as a separate franchise and royalty in the crown; and the county palatine of Lancaster, with the duchy which had been conferred on John of Gaunt, was at length, in the year 1485, vested in King Henry the Seventh and his heirs, as a distinct and separate inheritance from the Crown of England.

The Isle of Ely was never a county palatine, though frequently so called, but merely a royal franchise, the Bishop having, by grant of King Henry the First, *jura*

(*r*) 27 Hen. VIII. (1536) c. 24. (*s*) 36 & 37 Vict. c. 66, s. 16.

[*regalia* within the district, whereby he exercised a jurisdiction over all causes as well criminal as civil *(t)*.] By the Liberties Act, 1850, this secular authority of the bishop was taken from him, and vested in the Crown.

[There are certain counties *corporate*, otherwise called *counties of cities or towns*, to which, out of special grace and favour, the kings of England have from time to time granted the privilege to be counties of themselves, and to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein.] As such counties corporate constitute no part of the counties in which they are locally situate, so they had formerly, in general, no share in voting for the members to serve for those counties in Parliament; nor were they included within their respective counties, so far as regards the trial of offenders. But these exemptions have now been very largely abolished *(u)*.

In addition to these ancient civil divisions of townships, hundreds, and counties, England is now, for the purposes of local government, divided into many other units, such as Poor Law Unions, Petty Sessional Divisions, Urban and Rural Districts. But an account of these will more properly be given in that part of the work which deals with the Social Economy of the Realm *(x)*.

(t) 4 Inst. 220: *Catton* v. *Johnson*, (1619) Carth. 109; *Grant* v. *Bagge*, (1802) 3 East, 128.

(u) See Redistribution of Seats Act, 1885, and Local Government Act, 1888.

(x) See *post*, bk. iv., pt. iii.

the deed or act by a well-grounded apprehension of losing [life or limb (*g*). And such apprehension is also an excuse in law for many misdemeanors, as will appear in the course of these Commentaries (*h*).

Duress to life or limb is of two sorts, either, first, duress of imprisonment, as where a man actually loses his liberty; or duress *per minas*, as where the hardship is only threatened and impending. But in either case, the duress is duress to the person, as opposed to duress to a man's goods, with the latter of which species of duress we are not at present concerned. Duress *per minas* is either fear of death (*i.e.*, loss of life), or else fear of mayhem (*i.e.*, loss of limb). But in either case, the fear must be upon sufficient reason; that is (as Bracton expresses it), "*non suspicio cujuslibet vani vel meticulosi hominis, sed talis qui cadere possit etiam in virum constantem; talis enim debet esse metus, qui in se contineat mortis periculum, et corporis cruciatum*" (*i*). Therefore, the mere fear of a battery or of being beaten, however well grounded, is not duress to the person; because for the actual battery itself, a man may have satisfaction in damages. But for the loss of life or limb no suitable recompense can be made (*k*).

The law not only protects every man in the enjoyment of his life, but also furnishes him with everything necessary for its support; for, by the theory of our law, there is no man so indigent or wretched but he may demand, from the more opulent of his fellow-citizens, to be supplied with the necessaries of life, invoking for this purpose the provisions of the Poor Law Acts (*l*).

Rights of life and of limb can only be determined by death, civil or natural (*m*); civil death being where a man is outlawed, and becomes, as it were, dead in law (*n*).

(*g*) 2 Inst. 483.
(*h*) *Vide post*, bk. vi.
(*i*) Br. fo. 16 b; *R.* v. *Southerton*, (1805) 6 East, 126.
(*k*) 2 Inst. 483.
(*l*) *Vide post*, bk. iv., pt. iii.
(*m*) Co. Litt. 132 a.
(*n*) 3 Inst. 213.

Formerly, civil death also occurred when a man took sanctuary and abjured the realm (*o*), or entered into religion; in both of which cases he was deemed in law absolutely dead, so that his next heir had his estate. [For such abjured person, equally with the outlawed, was entirely cut off from society; and a monk, upon entering into religion, might, like other dying men, have made his last will, appointing executors; and if he made no will, the ordinary granted administration to his next of kin; and his executors or administrators might bring the same actions for debts due *to* the religious, and were liable to the same actions for debts due *from* him, as if he were naturally dead (*p*). In short, a monk was so effectually dead in law, that a lease made for the term of the life of one who afterwards became a monk, determined by his entry into religion,—for which reason leases for life were usually made to have and to hold for the term of the *natural* life of the grantor or lessor, grantee or lessee (*q*). But inasmuch as the law of England never assumed cognizance of *profession* in any foreign country, the fact not being triable in our courts (*r*), it was held, after the Reformation, that civil death could no longer take place by profession (*s*),] nor (by the effect of 21 Jac. I. (1623) c. 28, s. 7, abolishing sanctuaries) by abjuration (*t*). Nevertheless, it would still take effect on outlawry; but outlawry on civil process has also now been abolished by the Civil Procedure Acts Repeal Act, 1879 (*u*).

[It is to be observed also, that in respect of the enjoyment of life and limb, the law of England utterly forbids or excludes the arbitrary power of killing or maiming.

(*o*) Co. Litt. 133 a; *Newsome* v. *Bowyer* (1729), 3 P. Wms. 37, n. (B).

(*p*) Litt. s. 200; Co. Litt. 133 b.

(*q*) *Archbishop of Canterbury's Case* (1596), 2 Rep. 48 b; Co. Litt. 132 a.

(*r*) Co. Litt. 132 b.

(*s*) *Rex* v. *Lady Portington* (1692), 1 Salk. 162.

(*t*) 1 Hale, P. C. 605.

(*u*) 42 & 43 Vict. c. 59, s. 3.

[" *Nullus liber homo*," says the Great Charter, "*aliquo modo destruatur . . . nisi per legale judicium parium suorum vel per legem terræ*" (*x*),—which words, "*aliquo modo destruatur*," include, according to Sir Edward Coke (*y*), a prohibition not only of *killing* and *maiming*, but also of *torturing*. But, of course, *flogging*, for due cause and in proper cases, is permitted by the law, as part of the punishment, but not in the sense of a *torturing*, of the prisoner. Also, by the statute 5 Edw. III. (1331) c. 9, no man may be forejudged of life or limb, contrary to the Great Charter and the law of the land; and by the statute 28 Edw. III. (1354) c. 3, no man can be put to death without being first brought in answer by due process of law.]

As regards the other rights which are comprised under the general right of personal security,—namely, the enjoyment of a man's whole body, and of his health, and reputation,—these other rights entitle him to security from all corporal assaults, though they amount not to destruction of either life or limb; and to security from all such malpractices as may prejudice or annoy his physical health or vigour; and also to the security of his reputation or good name. But inasmuch as it is to the infringement of these rights rather than to the rights themselves that the provisions of the law have been directed, they will be more conveniently treated of when we are considering the law of *wrongs* (*z*).

II. [And secondly, the Right of *Personal Liberty*. Personal liberty consists in the power of moving one's person about to whatsoever place one's own inclination may direct, without imprisonment, hindrance, or restraint, unless by due course of law. Thus, it is an express provision of the Great Charter, that no freeman shall be

(*x*) C. 39 (ed. Stubbs).

(*y*) 2 Inst. 48. (As a matter of fact Coke does not, in this passage, speak of torture; but Blackstone's gloss is permissible.—E. J.)

(*z*) *Vide post*, bk. v. and bk. vi.

[taken or imprisoned, but by the lawful judgment of his peers, or by the law of the land (*a*); and other subsequent statutes of an early date also expressly provide, that no man shall be taken or imprisoned on mere suggestion or petition to the king or to his council, unless it be by legal indictment, or other due process of the common law (*b*). Also, by the Petition of Right of 1628 (3 Car. I.). it is expressly declared, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law; and by 16 Car. I. (1640) c. 10, s. 7, it was enacted, that if any person should be restrained of his liberty by order or decree of an illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he should upon demand of his counsel have a writ of *habeas corpus* to bring his body before the Court of King's Bench or Common Pleas; which court was thereupon to determine whether the cause of the commitment were just; and the court was to forthwith do as justice demanded. By the 31 Car. II. (1679) c. 2, commonly called the *Habeas Corpus Act*, amended and made more effectual by the Habeas Corpus Act, 1816, and other statutes, the methods of obtaining the writ of *habeas corpus* are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, excepting where the general law requires and justifies the detention, or where (in exceptional cases), special legislation has so provided. But at the same time, it is a rule with the courts, that they will not grant a *habeas corpus* as of course, and without probable cause shown (*c*). Lest the Habeas Corpus Acts should be evaded by demands of unreasonable bail or sureties for the prisoner's appearance, it is declared by the Bill of

(*a*) C. 39 (ed. Stubbs).

(*b*) 5 Edw. 3 (1331), c. 9; 25 Edw. 3 (1350), st. 5, c. 4; 28 Edw. 3 (1354), c. 3.

(*c*) *Hobhouse's Case* (1820), 3 B. & Ald. 420.

[Rights (*d*), that excessive bail ought not to be required;] and, by the Indictable Offences Act, 1848 (*e*), and the Bail Act, 1898 (*f*), further provisions have been made for facilitating the bail of accused persons.

[Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities. And some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. And yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger is such as to render this measure expedient. For it is Parliament only (or the legislative power) which, by suspending the Habeas Corpus Act for a short and limited time, can authorise the Crown to imprison suspected persons, without giving any reason for so doing. In like manner, the senate of Rome also was wont to have recourse to a dictator, or magistrate of absolute authority, when they judged the republic to be in grave and imminent danger. The decree of the senate in such a case was called the *senatus consultum ultimæ necessitatis*, which expression seems to show that this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise, amounts in law to an imprisonment; *e.g.*, keeping a man against his will in a private house, putting him in the stocks, or forcibly detaining him in the street, is an imprison-

(*d*) 1 W. & M. sess. 2 (1689), c. 2.

(*e*) 11 & 12 Vict. c. 42.

(*f*) 61 Vict. c. 7.

[ment (*h*). And the law so much discourages unlawful imprisonment of every sort, that if a man, while under *duress of imprisonment*, seals a bond or the like, he may afterwards avoid the deed, that is, when the imprisonment is illegal, not when it is legal (*i*). Every legal imprisonment, that is to say commitment to prison, must either be by process from the courts, or by warrant from some person having authority to commit. And when the commitment is under a warrant, the warrant must be in writing, under the hand and seal of him by whom it is given, and must express the cause or causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed in the warrant, the gaoler is not bound to detain the prisoner (*k*).

A natural and regular consequence of the right of personal liberty is, that every Englishman may claim to abide in his own country so long as he pleases, and not to be driven from it or sent out of it, unless by the sentence of the law. The king indeed, by his royal prerogative, may issue his writ *ne exeat regno*, to prohibit any of his subjects from going out of the kingdom into foreign parts without licence; for that may be necessary for the public welfare or for the due safeguarding of the Commonwealth (*l*). But no power on earth, except the authority of Parliament, can send a subject *out* of the kingdom against his will; for exile was never sanctioned by the common law, except in the case of abjuration of the realm (*m*). And though, in comparatively modern times, persons, criminals under sentence of "transportation" (*n*), have been sent into

(*h*) 2 Inst. 589.

(*i*) *Ibid.* 482.

(*k*) *Ibid.* 52.

(*l*) Practically, the writ *ne exeat regno* is now only issued in cases falling under secs. 4 and 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). *Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341.

(*m*) Co. Litt. 133 a.

(*n*) Transportation was abolished by the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), and "penal servitude" substituted.

[places beyond the seas, that has been done either by their own choice, to escape capital punishment, or else it has been under the express authority of some Act of Parliament (*o*). And the Great Charter expressly declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land (*p*). And by the Habeas Corpus Act, 1679 (31 Car. II. c. 2), it is enacted, that no subject of the realm shall be sent prisoner into places beyond the seas; that the person who shall dare to commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and shall be incapable of receiving the king's pardon: and that the party injured shall have his civil action also against the wrongdoer, his aiders, advisers, and abettors, whereby he shall recover his costs and also damages to the extent of at least five hundred pounds. Moreover, the law, in these particulars, is so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service,—except, of course, sailors and soldiers, the nature of whose employment of itself implies an exception. And the Crown cannot even constitute a man lord lieutenant of Ireland, or make him a foreign ambassador, against his will. For this might, in reality, be no more than an honourable exile (*q*).]

(*o*) It is said, that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Eliz., when a statute enacted that "such rogues as were dangerous to the inferior people should be banished the realm" (39 Eliz. (1597), c. 4; see Barrington, *Observations on the Statutes*, 268 *n*, 269); and that the first statute in which the word "transportation" is used is the 18 Car. 2 (1666), c. 3, which gave a power to the judges, at their discretion, either to execute, or to *transport* to America for life, the moss-troopers of Cumberland and Northumberland.

(*p*) C. 39 (ed. Stubbs).

(*q*) 2 Inst. 47.

The right of every Protestant subject to carry arms, *i.e.*, such as are proper for his defence, is a right declared by the Bill of Rights (1689) (*r*); and it is in fact, when exercised with sobriety and under due restrictions, an incident to the right of self-preservation. But to go armed under circumstances which tend to terrify the people, or with an intention to disturb the public peace, is forbidden by the law (*s*). Also, the training of persons, without lawful authority, in the use of arms, is forbidden by the Unlawful Drilling Act, 1819 (*t*).

(*r*) 1 W. & M. sess. 2, c. 2.
(*s*) 2 Edw. 3 (1328), c. 3; Hawk. P.C., bk. 1, ch. lxiii.
(*t*) 60 Geo. 3 & 1 Geo. 4, c. 1.

BOOK II.

OF RIGHTS OF PROPERTY.

AS TO PROPERTY IN GENERAL.

THE right of property in an individual may be defined as consisting in the free use, enjoyment, and disposal of his belongings, according to the law; and it may otherwise be described as the right or principle by which one man claims and exercises dominion over certain external things, to the exclusion of all other individuals therefrom.

[In the beginning of the world, as we are informed by holy writ, the all-bountiful Creator gave to man "dominion over the fish of the sea, and over the fowl "of the air, and over every living thing that moveth upon "the earth" (*a*). The earth, therefore, and all things therein, are the general property of mankind, exclusive of other beings, under the immediate gift of the Creator; and while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required. However, even in the earliest ages it appears that, by the law of nature, he who first began to use a thing, acquired therein a transient property, the *right* of possession continuing while the *fact* continued (*b*); so that, *e.g.*, whoever was in the occupation of any definite spot of land,—for rest, for shade, or the like,—acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force. But the instant

(*a*) Genesis i. 28.

(*b*) Puffendorf, *Law of Nature* (ed. Kennet), p. 367.

[that he quitted the use or occupation of it, another might seize it without injustice. And when mankind increased, and life grew more complicated and refined, the individual who had constructed for himself a habitation for his own shelter and safety, or who had woven for himself some garment for his own warmth and comfort, was recognised as having some property therein; for even the brute creation maintained a property in their dwellings.]

The idea of property seems therefore to have had its original foundation in *occupancy*, confirmed and strengthened by *labour*. [The reason why *occupancy* should convey the right of property has been variously accounted for,—Grotius and Puffendorf insisting that this right of occupancy, as a mode of acquiring property, is founded on a tacit and implied assent of all mankind; and Barbeyrac, Locke, and others, holding that no such implied assent is necessary, for that the very act of occupancy alone, being a degree of bodily labour, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title.

Property, both in lands and moveables, being thus acquired by the first taker, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it. So, if one is possessed of a jewel, and casts it into the sea, or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary. And if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in such case the property still remains in the loser, who may claim it again of the finder.

The right of ownership drew after it the right of

[transfer, a sort of mutual convenience preparing the way for, and suggesting, a commercial traffic in things, by the transfer thereof; in which transfer was involved both the abandonment of the thing by the previous owner and its immediate occupancy by the new proprietor. And, as regards the transfer of property upon the death of the proprietor, the universal law of almost every nation has either given the dying person a power to dispose of his possessions by will, or else has designated his successor, the object of this provision of the law being to prevent any vacancy in the possession. For which reason the Roman law considered father and unemancipated child as one person; so that, upon the death of either, the inheritance did not so properly descend, as continue in the survivor of them (*c*). And, as regards the right of the children or nearest relations of the deceased to inherit, it appears that such right was more antient than the right of alienation, the children or other nearest relations being usually about the man on his death-bed, and becoming therefore naturally the next immediate occupants. Whence also, in the earliest ages, on failure of children, a man's servants, born under his roof, were allowed to be his heirs, being immediately on the spot when he died (*d*).

The power of testamentary disposition followed later on, and in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his moveables from his wife and children; and, in general, no will was permitted of lands, till the reign of Henry the Eighth. And then only of a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present.]

(*c*) Dig. xxviii. 2, 11.

(*d*) Gen. xv. 3. (This little flourish of Blackstone must not be taken too seriously. The true reason why, in early stages of civilization, a man's belongings go, on his decease, to his nearest relatives, is, that those relatives belong to the group which claims control of them.)

Such having been the origin of property, and of the power of transferring it, it has always been the principal object of the law to protect property from unjust invasion. Thus, by the Great Charter, no freeman may be disseised or divested of his freehold, save by the lawful judgment of his peers, or by the law of the land (*e*). And, by a variety of statutes passed in the reign of Edward the Third (*f*), no man's lands or goods may be seized into the king's hands against the Great Charter and the law of the land; and a man may not be disinherited, nor put out of his franchise or freehold, by any other, unless he be first duly forejudged by course of law. And even for the general good of the whole community, no right of property is allowed by our law to be unjustly infringed. And so, if a new road, for example, is to be made through the grounds of a private individual, in a case where it would be extensively beneficial to the public, the legislature never permits itself to do this without the consent of the owner of the land, or at least without securing to him a complete indemnification. In other words, the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance; and all that the legislature does is to oblige the private owner to alienate his possession for a reasonable price (*g*).

(*e*) C. 39 (ed. Stubbs).

(*f*) 5 Ed. 3 (1331), c. 9; 25 Edw. 3 (1350), st. 5, c. 4; 28 Edw. 3 (1354), c. 3.

(*g*) See, *e.g.*, The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).

PART I.

OF THINGS REAL.

THE subjects of property are things *real* and things *personal*; things *real* consisting of things substantial and immoveable, and of the rights and profits issuing out of them, and things *personal* consisting of goods and other moveables, and of the rights incident or relative thereto (*h*).

The First Part of the present Book will relate to things Real, and the Second to things Personal; things real being usually called Real Property or Real Estate, and things personal Personal Property or Personal Estate.

(*h*) Blackstone says, "*things* "*real* are such as are permanent, "fixed and immoveable, which "cannot be carried out of their "place, as lands or tenements: "*things personal* are goods, money, "and all other moveables, which "may attend the owner's person "wherever he thinks proper to "go." (2 Bl. Com. p. 16.)

CHAPTER I.

OF THE DIVISIONS OF THINGS REAL.

[THINGS real consist in lands, tenements, or hereditaments. *Land*, says Sir Edward Coke, "in the legal signification comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses and heath. It legally includeth also all castles, houses and other buildings: for castles, houses, &c., consist upon two things, viz. *land* or ground, as the foundation, and structure thereupon; so as passing the land or ground, the structure or building, thereupon passeth therewith" (*i*). It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law. And therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as for so many cubical yards, or by superficial measure, as for twenty acres of water, or by general description, as for a pond, a water-course, or a rivulet. But I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*k*). For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary and usufructuary property therein (*l*). But the land which that water

(*i*) Co. Litt. 4 a; *Ewer* v. *Hayden* (1594), Cro. Eliz. 476; *Cooke* v. *Yates* (1827), 4 Bing. 90. (But note that, in the former case, houses did pass under a devise of land, being excluded by inference.)

(*k*) *Challoner* v. *Thomas* (1608), Brownl. 142.

(*l*) *Race* v. *Ward* (1855), 4 E. & Bl. 702.

[covers, is permanent, fixed, and immoveable; and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land. And, downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs in general to the owner of the surface. So that the word "land" includes not only the face of the earth, but everything under it, or over it (*m*). And therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. And although by the name of a messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of, yet by the name of land, which is *nomen generalissimum*, everything terrestrial will pass (*n*).] And that is by the common law; apart altogether from the even more extended meaning which may, by particular statutes, be assigned to the word "land" (*o*).

["Tenement" is a word of still greater extent; and though in its vulgar acceptation it is only applied to houses and other buildings; yet in its original, proper, and legal sense, it signifies everything that may be *holden*, that is, which can be the subject of *tenure*, and includes not only *land*, but rents, commons, and other rights and interests issuing out of or concerning land (*p*).

(*m*) Shep. Touch. 90; *Raine* v. *Alderson* (1838), 6 Scott, 691. (But this statement should be qualified by the restriction, that, if the grant is obviously for a specific purpose, *e.g.* of a term of years for building, no mineral rights pass, except such as are necessary to achieve the purpose. *Elwes* v. *The Brigg Gas Co.* (1886), 33 Ch. D. 562.)

(*n*) Co. Litt. 4 a—6 b.

(*o*) *E.g.* Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 2 (ii.).

(*p*) Co. Litt. 6 a, 20 a, 78 a; *R.* v. *Whixley* (1786), 1 T. R. 137; *Dodds* v. *Thompson* (1865), L. R. 1 C. P. 133.

[But *hereditament*, says Sir Edward Coke, "is the largest word of all in that kind (*q*); for whatsoever may be *inherited* is an hereditament, be it corporeall or incorporeall, real, personal, or mixed." Thus an heirloom, or implement of furniture, which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere moveable: yet, being inheritable, is comprised under the general word hereditament. And so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament (*r*).

Hereditaments, then, to use the longest expression, are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the subject of sensation, can neither be seen or handled, are creatures of the mind, and exist only in contemplation.] It is to corporeal hereditaments that our attention must be first directed; and whatever is said generally, hereafter, as to the law of real property, it is to be understood as referring to corporeal hereditaments only, until those of the incorporeal kind present themselves, in their turn, for separate consideration, in a distinct chapter.

(*q*) Co. Litt. 6 a; *Moore* v. *Denn* (1800), 2 Bos. & Pul. 251; *Pocock* v. *Bishop of Lincoln* (1821), 3 Brod. & Bing. 33.

(*r*) *Marquis of Winchester's Case* (1583), 3 Rep. 2 b.

CHAPTER II.

OF TENURES.

In proceeding to treat of corporeal hereditaments or things real, we shall consider, first, the tenure by which they may be holden; secondly, the estates which may be had in them; and, thirdly, the titles by which they are acquired and lost.

[And, first, as to *Tenures*. These it will be impossible to understand properly unless we have some previous acquaintance with the nature of feuds and with the feudal law, a system established during the middle ages throughout the greater part of Europe, and from thence derived to England, where its spirit still lives in several of her institutions. Now, feuds were introduced under the new dynasties founded by the barbarous tribes, who, during the fourth, fifth, and sixth centuries, poured themselves from Germany and the neighbouring countries into the Roman empire (*s*). In every province which they subjugated, large tracts of territory were divided by lot among the conquerors, some portion falling to the king or leader of the invading tribe, and the rest to his soldiers, who received their shares as free and independent property, subject only to the condition of bearing arms, as occasion might require, in the defence of the community from hostile aggression. Of the lands assigned to the leader of the tribe, certain portions were afterwards usually distributed by him among his adherents, and chiefly among his courtiers or companions (*comites*). But the interest they derived

(*s*) Spelman, *Feuds* (cap. ii.); Wright, *Tenures*, (cap. i.); Co. Litt. by Harg. 64 a, n. (1); 191 a, n. by Butler.

under these grants was not strictly in the nature of property; it was of a beneficial or usufructuary kind only, a mere stipendiary return for services (commonly services of a military description) which they were expected to render to their master, and subject at some future period to resumption. The *proprietas*, or actual ownership of the land, was considered as still residing in the sovereign himself.

The species of interest, which we find described sometimes as a *munus* and sometimes as a *benefice* (*t*), was latterly called a *feud*,—a term which signified in the German language a stipendiary estate, and stood in contradistinction to *allodium*, the phrase applied to that independent species of property, before described, which had originally become vested by allotment in the conquerors of the country. There began thus to arise two distinct modes of holding or possessing land; for the stipendiary held *of* (that is, in relation to and in dependence upon) a superior, while the allodialist held of no one, but enjoyed his land as free and independent property.

The interest of the stipendiary or beneficiary tenant did not originally extend beyond his own life, if it was not even determinable at the royal pleasure. But in course of time it gradually improved in stability, and acquired an *hereditary* character, which led by a natural progress to the practice of *subinfeudation;* for the stipendiary, (or feudatory, as he should now rather be termed,) considering himself as substantially the owner, began to imitate the example of his sovereign, by carving out portions of the benefice or feud, to be held of himself by some other person, on terms and conditions similar to those of the original grant. A continued chain of successive dependencies was thus established, connecting

(*t*) The portions of land thus distributed were at first revocable at the will of the lord, and were then, it is said, called *munera*. They were afterwards held for some limited time (usually one year), and called *beneficia*. In process of time they began to be granted in perpetuity, and were then called *feuda*. (Spelman, *loc. cit.*; Cowell, *Interpreter*, *in verb.*)

each stipendiary, or *vassal* as he was termed, with his immediate superior or *lord*.

The beneficiary or feudal relation was well suited to times of violence and insecurity, and was attended with great advantage both to the lord and to the vassal. To the lord, as it secured to him a band of military retainers, attached by duty and by sentiment to his person; and to the vassal, as it brought him into close connection with a powerful superior, under whom he found shelter from oppression. The effect of this, as regarded the allodial species of property, was remarkable; for the allodialist, though enjoying a nominal independence, was yet envious of the comparative security of the feudal vassal, and therefore gradually placed himself in a similar relation, changing the nature of his property from allodial to feudal. This change he effected, by giving up or surrendering his land to some powerful lord, and receiving it back again from him in the shape of a beneficium or feud, to be held upon some kind of service; or, more simply, by merely *acknowledging* himself to hold as a vassal to some chosen lord, under specified services, as if by the effect of a former grant, which had, in truth, never taken place. And in one or other of these two ways, allodial lands were largely converted into feudal, although there were many estates which always continued to be held allodially (*u*).

[The feud was conferred by words of gratuitous and pure donation, *dedi et concessi;* which words would still be the operative words in a modern deed of feoffment. And the donation was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the

(*u*) Co. Litt. by Harg. 65 a, n. (1).

[vassal usually, upon investiture, did *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that "he did become his *man* from that day forth, of life and limb and earthly honour." And then he received a kiss from his lord (*x*).

When the tenant had thus professed himself to be the man of his superior, or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do *suit* to, the lord in his courts in time of peace, and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the judge over all his feudatories; and therefore the vassals were bound by their fealty to attend their domestic courts baron, in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow tenants. And upon this account, in all the feudal institutions, both here and on the continent, they are distinguished by the appellation of peers of the court—*pares curtis*, or *pares curiæ*. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated in the first donation, in proportion to the quantity of the land.

Although, as we have said, feuds did not originally extend beyond the life of the first vassal, in process of time they were universally extended to his *sons*. And where a feud was given to a man and his *sons*, all his sons succeeded him in equal portions, and (as they died off) their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*y*). But when such a

(*x*) Litt. s. 85. (*y*) Wright, *Tenures*, 17.

[feud was given to a man, and his *heirs*, in general terms, then, upon the death of the feudatory, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who had thus succeeded, died, his male descendants were also admitted in the first place, and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud but such as was *of the blood of*, that is, lineally descended from, the first feudatory" (*z*). And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. But this was found upon many accounts inconvenient, particularly by dividing the services, and thereby weakening the strength of the feudal union; and, moreover, *honorary* feuds, or titles of nobility, being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son; in imitation of these last, *military* feuds (or those we are now describing) began also in most countries to descend, according to the rule of primogeniture, to the eldest son, in exclusion of all the rest (*a*).

The original feuds were all of a military nature, and in the hands of military persons. But these feudatories found it necessary to commit parts of their feuds to inferior tenants, obliging the latter to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend to their military duties without distraction; which returns, or *reditus*, were the origin of rents. And by this means, the feudal polity was greatly extended, these inferior feudatories being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their

(*z*) Wright, *Tenures*, 183. (*a*) *Ibid.* 32.

[immediate superiors or lords (*b*). And in process of time, feuds came to be divided into *feuda propria et impropria*, the feud proper comprehending the military feud, and the feud improper comprising all the others, such, for instance, as had been originally sold to the feudatory for a price, such as were held upon a money rent, or upon other base and less honourable services, in lieu of military service, such as were alienable without mutual licence, and such as might descend indifferently either to males or females (*c*).

The feudal system was not received, at least not universally received, in England, till the reign of William the Norman (*d*). And in fact, it was not until the eleventh or twelfth century that feuds arrived to their full vigour and maturity, even on the continent of Europe (*e*). Moreover, the introduction of the feudal tenures into England by King William does not seem to have been effected immediately after the Conquest, but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror. But we learn from the Saxon Chronicle (*f*), that in the nineteenth year of King William's reign, an invasion being then apprehended from Denmark, the country was found to be defenceless, which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landowner, and greatly oppressed the people. So soon, therefore, as the danger was over, the king held a great council to inquire into the state of the nation (*g*); the immediate consequence of which was the compiling of the great survey called Doomsday Book, which was finished in the next year. And in the latter end of that very year, the king was attended by all his nobility at Sarum; where all the

(*b*) Wright, *Tenures*, 20.

(*c*) *Ibid.* 36.

(*d*) Spelm. *Gloss.* 218.

(*e*) Hallam, *Middle Ages*, vol. i. p. 179 (12th ed.).

(*f*) A.D. 1085 (ed. Thorpe, i. 353).

(*g*) "After this had the king 'much counsel, and very deep "speech with his *witan* about this "land; how it was set, and with "what men."—Chron. Sax. *ib.*

[principal landowners submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (*h*). The feudal system was in this way formally introduced into this country; and that it now became the almost universal tenure appears by a statute attributed to the same monarch:—"*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et quod sint semper prompti et bene parati ad servitium suum integrum nobis explendum, et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere; et sicut illis statuimus per commune concilium totius regni nostri prædicti*" (*i*).]

It is probable that, by thus consenting to the introduction of feudal tenures, our English ancestors meant no more than to put the kingdom in a state of defence by establishing a military system, and to oblige themselves, in respect of their lands, to maintain the king's title and territories with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But, whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, gave a very different construction to this proceeding; and thereupon took a handle to introduce, not only the rigorous feudal doctrines which prevailed in the Duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations (*k*). [The Norman Conqueror, and his son, William Rufus, kept up with a high hand all the rigours

(*h*) "And there his *witan* came "to him, and all the landholding "men of weight, whosesoever men "they were; and all bowed down "to him, and became his men, "and sware him oaths, that they "would hold to him against all "other men."—Chron. Sax. A.D. 1086.

(*i*) Wilkins, *Leg. Anglo-Sax.* LL. Guil. Con. ch. 8, p. 288.

(*k*) Spelm. *Feuds*, ch. 28; Wright, *Tenures*, 81.

[of the feudal doctrines. But their successor, Henry the First, found it expedient, when he set up his pretensions to the Crown, to promise a restitution of the laws of King Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it (*l*). But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of King John, they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him. This insurrection at length produced the famous charter of Runing-mead, which, with some alterations, was confirmed by his son Henry the Third and also by subsequent kings (*m*), is commonly called Magna Carta, and is now cited as 9 Hen. III.

The general introduction of the feudal system into this country gave rise to the fundamental maxim of the law of England, that all land belonging to any subject is *holden* of some superior, and either mediately or immediately of the Crown (*n*); for in this realm, according to Sir E. Coke, we have not *allodium* (*o*). And as all lands in England are holden, they are consequently called *tenements*, the possessors thereof *tenants*, and the manner of their possession a *tenure* (*p*). Where the tenure is of the Crown immediately, it is said to be *in capite*, or in chief. But the holding may also be mediate, that is, in the way of subinfeudation; for such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also

(*l*) Wilkins, *Leges Anglo-Sax.* LL. Hen. 1, ch. 1 (pp. 233—4).

(*m*) Sir E. Coke reckons above thirty instances wherein the charter granted by King John was solemnly ratified. (Co. Litt. 81, and 2 Inst. 1.)

(*n*) Co. Litt. 1, 65 a.

(*o*) *Ibid.* 1 b.

(*p*) *Ibid.*

[lords with respect to those inferior persons, as they were still tenants with respect to the king. And, thus partaking of a middle nature, they were called *mesne* or middle lords. So that if the king granted a manor to A., and A. granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord *paramount;* A. was both tenant and lord, or was a mesne lord; and B. was called a tenant *paravail,* or the lowest tenant (*q*). In this manner are all the lands of the kingdom holden, which are in the hands of subjects.

There seem to have subsisted among our ancestors four principal species of lay tenures, distinguished respectively by the *services* which were required to be rendered in respect thereof. For the services, in respect of their quality, were either *free* or *base;* and in respect of their quantity, and the time of exacting them, they were either *certain* or *uncertain. Free* services were such as were not unbecoming the character of a soldier, or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank, as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. *Certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. *Uncertain* services depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base, or villein service.

(*q*) 2 Inst. 296.

[From the various combinations of these services have arisen the four kinds of lay tenure, which subsisted in England till the middle of the seventeenth century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the most compendious account of any author, antient or modern. "Tenements are of two kinds, frank-tenement "and villenage. And of *frank-tenements*, some are held "freely, in consideration of homage, and *knight-service*; "others in *free-socage* with the service of fealty only, "or, according to some authorities, with fealty and "homage" (*r*). And again, "of *villenages*, some are pure, "others privileged. He that holds in pure villenage shall "do whatsoever is commanded of him, and always be "bound to an uncertain service. The other kind of "villenage, (which is holden of the king, from the time of "the Conquest), which is called *villein-socage*, and which "is *villenage*, but *privileged*. And so tenants of the "king's demesnes have the privilege that they cannot be "removed from the land while they will and can render "the services due; and these villein-socmen are properly "called *glebæ ascriptitii*. They perform villein services, "but such as are certain and determined" (*s*). Of which the sense seems to be as follows: First, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c., that tenure is called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villenous* or servile. As, thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature, but

(*r*) Bract. l. 4, ch. 28, § 1 (fo. 207). (*s*) *Ibid.* § 5 (fo. 209).

[reduced to *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage, *villenagium privilegiatum*.

A. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin *servitium militare*, and in law-French *chivalry*; and it differed very little from a pure and proper feud, being entirely military in its character. To make this holding, a determinated quantity of land was necessary, which was called a knight's fee, *feodum militare* (*t*); the value of which was stated in 1 Edw. II. at 20*l.* per annum (*u*). And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days; and so in proportion (*x*).

A feud of this tenure was granted by words of pure donation, *dedi et concessi*; was transferred by investiture or delivering corporal possession of the land, usually called "livery of seisin"; and was perfected by homage and fealty. It also drew after it the following consequences, as inseparably incident to the tenure in chivalry.

1. *Aids* were originally mere benevolences, granted by the tenant to his lord, in times of difficulty and distress; but, in process of time, they grew to be considered as a matter of right. Those aids were principally three. First, to ransom the lord's person if taken prisoner, a necessary consequence of feudal relationship (*y*). Second, to make the lord's eldest son a knight, a matter attended formerly with great ceremony, pomp, and expense; but

(*t*) Co. Litt. 69 a.

(*u*) *Ibid.*; see the so-called Statute for Knights of 1307, in the ordinary editions of the statutes.

(*x*) Litt. s. 95.

(*y*) Libri Feudorum II. 24, s. 2. (This work will be found appended to the older editions of the Corpus Juris Civilis.)

[this second aid was not payable until the lord's heir was fifteen years old, or capable of bearing arms (*z*). Third, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender, few lords being able to save much out of their incomes for this purpose, and all being unable, from the very nature of the tenure thereof, to charge the lands with any portions for their children. And it appears that no vassal was exempt from any of these aids, not even the monasteries (*a*).

But besides these antient feudal aids, the tyranny of lords by degrees exacted more and more, *e.g.*, aids to pay the lord's debts, and aids to enable him to pay the aids due to his superior lord; to remedy which abuse King John's *Magna Carta* ordained that no aids be taken by the king without the consent of Parliament, nor in any wise by inferior lords, save only the three antient ones above mentioned (*b*). This provision was omitted in subsequent charters, but re-enacted and confirmed in the 25 Edw. I., 1297, when the statute called *Confirmatio Cartarum* was enacted. King John's charter also ordered, that aids taken by mesne lords should be reasonable (*c*); and that the aids taken by the king (other than the three antient aids) should be settled by Parliament. Eventually, by the Statute of Westminster I. (*d*) (as regards ordinary tenants by knight-service) and by the 25 Edw. III. (1350) st. 5, c. 11 (as regards tenants *in capite* of the Crown), the aid for making the lord's eldest son a knight, and the aid for marrying his eldest daughter, was fixed at twenty shillings, the supposed twentieth part of the annual value of a knight's fee. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was on that account never ascertained.

(*z*) 2 Inst. 233.
(*a*) Phillips, *Life of Pole*, I. 223.
(*b*) Caps. 12, 15 (ed. Stubbs).
(*c*) *Ibid.* 15.
(*d*) 3 Edw. I. (1275) c. 36.

[2. *Relief* was another incident in every feudal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. The amount was at first probably uncertain, being in fact arbitrary at the will of the lord (*e*); but William the Conqueror by his laws *ascertained* it at 100*s*. (*f*). William Rufus, however, broke through this composition, and again demanded arbitrary, uncertain reliefs; thereby in effect obliging every heir to new-purchase or *redeem* his land. But his brother, Henry the First, restored the composition, and ordained that the relief to be paid should not be an arbitrary redemption (*g*). And eventually the composition of 100*s*. for every knight's fee was universally established (*h*).

3. *Primer seisin* was a feudal burden, only incident to the King's tenants *in capite*, and not to those who held of inferior or mesne lords (*i*). It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir, (provided he were of full age), one whole year's profit of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life (*k*). This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the antient law of feuds, immediately upon a death of a vassal, the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it and receive investiture. During this interval, the lord was entitled to the profits; and, unless the heir claimed within a

(*e*) Wright, *Tenures*, 99.

(*f*) Wilkins, *Leges Anglo-Sax.* LL. Guil. Con. cc. 22, 23, 24 (p. 223).

(*g*) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitimâ et justâ relevatione relevabit eam.*"—(Charter of Henry I. ed. Stubbs, c. 2.)

(*h*) Glanv. ix. 4; Litt. s. 112.

(*i*) Stat. Marlb. (52 Hen. 3 (1267)), c. 16; *Prerogativa Regis* (17 Edw. 2), c. 3 (alleged statute of 1324).

(*k*) Co. Litt. 77 a.

[year and a day, it was by the strict law a forfeiture (*l*). This practice, however, seems not to have long obtained in England, if ever, with regard to tenures under inferior lords ; but, as to the king's tenures *in capite*, this *primer seisin* was expressly declared to belong to the king by prerogative. And the king was entitled to enter and receive the whole profits of the land, till livery was sued, which suit being commonly within a year and a day next after the death of the tenant; and therefore the king used to take *the first fruits* at an average, that is to say, one year's profits of the land (*m*). Which right of the Crown afterwards gave a handle to the popes, who claimed to be feudal lords of the Church, to claim, in like manner, from every clergyman in England the first year's profits of his benefice, by way of *primitiæ* or first fruits.

4. These payments were only due if the heir was of full age ; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of the heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir male unable to perform knight-service till twenty-one ; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen ; yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the Statute of Westm. I., 3 Edw. I. (1295) c. 22 (*n*).

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain ;* that is, the delivery of their

(*l*) Lib. Feud. II. 24.
(*m*) Staundf. *Prerog.* fo. 12.
(*n*) Litt. s. 103 : 2 Inst. 204.

[lands out of their guardian's hands (*o*). For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *Magna Carta* (*p*). However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins (*q*). In order to ascertain the profits that arose to the Crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices (or justices in eyre) had it formerly in charge to make inquisition concerning them by a jury of the country, commonly called an *inquisito post mortem* (*r*); which inquisition was directed to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was, so as thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon (*s*). And afterwards, a court of wards and liveries was erected, for conducting the same enquiries in a more solemn and legal manner (*t*).

When the heir thus came of full age, provided he held a knight's fee, he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For, in those heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. This prerogative, of compelling the vassals to be knighted, or to pay a fine, was expressly recognized in Parliament by the Statute *de Militibus* (*u*); was exerted as an expedient for raising money by many of our best princes, particularly by Edward the Sixth and Queen Elizabeth; but yet was the occasion of many murmurs when exerted by Charles the First. Eventually,

(*o*) Co. Litt. 77 a.

(*p*) 9 Hen. 3 (1225) c. 3.

(*q*) Co. Litt. 77 a.

(*r*) *Articles of the Eyre*, in Statutes of the Realm I. 233.

(*s*) 4 Inst. 198.

(*t*) St. 32 Hen. 8 (1541), c. 46; 33 Hen. 8 (1541) c. 22.

(*u*) 1 Edw. 2, st. 1 (attrib. to 1307).

[that unhappy prince agreed to divest himself of this prerogative, which was accordingly abolished in the year 1640, by the statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; namely, the right of *marriage*, or power of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian might tender him or her a suitable match, without *disparagement* or inequality (*x*); which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian. And, if the infants married themselves, without the guardian's consent, they forfeited *double* the value, *duplicem valorem maritagii*. This seems to have been one of the greatest hardships of our antient tenures, and to have had its origin in the consent which was required on the part of the lord to the marriage of his *female* wards, a custom which was founded in good sense (*y*). The exaction of a price for the consent was an abuse which crept in later; and the extension of the claim, from female to male wards, appears to have arisen from a strained construction of a clause in Magna Carta (*z*). However, the right of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the Statute of Merton (*a*).]

6. The ordinary tenant in chivalry, on arriving at the full age of twenty-one, had the power of *alienating* his land, or, at all events, part thereof. But this alienation was originally by way of sub-infeudation only (*b*); and it was not until the statute of *Quia Emptores* (18 Edw. I. (1290) st. 1) that the tenant acquired the full power of alienation *inter vivos*. Under that statute the land aliened was to be held by the vendee of the same lord of

(*x*) Magna Carta (9 Hen 3 (1225)), c. 6.
(*y*) Bract. L. 2, c. 37, s. 6, fo. 88.
(*z*) 9 Hen. 3 (1225), c. 6.
(*a*) 20 Hen. 3 (1235) c. 7.
(*b*) Wright, *Tenures*, p. 154; Co. Litt. 43 a.

whom the vendor himself had held it previously. But the tenant in chivalry had no power of aliening his land by will.

And the king's tenants *in capite*, not being included in the words of *Quia Emptores*, could not aliene without a licence ; for if they did, it became a question whether the land was not absolutely forfeited (*c*). [But this severity was mitigated by the statute 1 Edward III. (1327) c. 12, which declared, that in such a case the lands should not be forfeited, but a reasonable *fine* be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation ; but, if the tenant presumed to aliene without a licence, a full year's value should be paid (*d*).

7. The last consequence of tenure in chivalry was *escheat ;* which is the determination of the tenure, or dissolution of the mutual bond between lord and tenant, from the extinction of the blood of the latter, by either natural or civil means. For, if the tenant died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony (whereby every inheritable quality was entirely blotted out and abolished), in such cases the land escheated, or fell back, to the lord of the fee ; that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. The consequence of which was, that the gift, being determined, resulted back to the lord who gave it.

These were the principal qualities, fruits, and consequences of the tenure by knight-service properly so-called ; but there were also some other species of knight-service, improperly so-called. Such was the tenure by *grand serjeanty, per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person, as to carry his banner, his sword, or the

(*c*) 2 Inst. 66. (*d*) *Ibid.* 67.

[like; or to be his butler, champion, or other officer, at his coronation (*f*). It was in most other respects like knight-service (*g*); only the tenant was not bound to pay aid or escuage (*h*); and, when tenant by knight-service paid five pounds for a relief on every knight s fee, tenant by grand serjeanty paid one year's value of his land, were it much or little (*i*). Tenure by *cornage*, which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was, (like other services of the same nature), a species of grand serjeanty. No one could hold in grand serjeanty, but of the king only (*k*).

These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance growing troublesome, the tenants found various means of evading or compounding it; first, by sending others in their stead, and afterwards by making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction came at last to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium*, or *servitium scuti*, *scutum* being then a well-known denomination of money; and it was called, in our Norman-French, *escuage*, being indeed a pecuniary, instead of a military, service. The first time this appears to have been taken was in the fifth year of Henry the Second, on the occasion of his expedition to Toulouse; but it soon came to be so universal that personal attendance fell quite into disuse. Hence we find, that in our antient histories, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops (*l*). And

(*f*) Co. Litt. 105 b.
(*g*) *Ibid.* 108 a.
(*h*) 2 Inst. 233.
(*i*) Litt. s. 158.
(*k*) *Ibid.* 156.
(*l*) It is said to have been levied only forty times. (See Pollock and Maitland, *History of English Law* I. 253.)

[these assessments, which appear at first to have been arbitrarily levied at the king's mere pleasure, were, after a long struggle, at last subjected to the control of Parliament, like all other taxes (*m*).]

So long as this elaborate scheme of tenure fulfilled its original object, viz., that of forming a national militia of barons, knights, and gentlemen, its inconveniences were tolerated, or perhaps not severely felt. But [by the degeneracy of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages of the feudal constitution were destroyed, and nothing but the hardships remained. The whole system now tended to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime, the families of all our nobility and gentry groaned under the intolerable burdens which were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. A slavery so complicated and so extensive as this, called aloud for a remedy in a nation that boasted of her freedom. Palliations were from time to time applied by successive Acts of Parliament, till at length the humanity of King James the First consented, for a proper equivalent, to abolish them all. His plan seems to have been, that by way of compensation for the loss which the Crown and other lords would sustain, an annual fee farm rent should be settled and inseparably annexed to the Crown, and assured to the inferior lords, payable out of every knight's fee, within their respective seignories. An expedient seemingly much better than the hereditary excise, which was the equivalent eventually adopted by the 12 Car. II. (1660) c. 24, being the statute which abolished all the feudal burdens. By which statute it was enacted, "that the court of wards and liveries, and all wardships, liveries,

(*m*) Magna Carta of 1215 (ed. Stubbs), c. 12; 25 Edw. 1 (1297). (As a matter of fact, scutage is not mentioned by name in the 25 Edw. 1.—E. J.)

[primer seisins, and ousterlemains, values and forfeitures of marriages, by reason of any tenure of the king's majesty, or other, by knight-service . . . be taken away and discharged . . . and that all fines for alienations, tenure by homage . . . knight-service, escuage, and also *aid pur file marrier, and pur fair fitz chevalier*, . . . and all tenures of the king *in capite*, be taken away and discharged . . . and that all tenures held of the king or others, be turned into free and common socage" (*n*). The statute also expressly provides (*o*), that all tenures thereafter created by the king should be deemed free and common socage; but it sanctions the retention of tenures in frankalmoign, and by copy of court roll, and the honorary services of grand serjeanty (*p*). A statute which was a greater acquisition to the civil property of this kingdom than even *Magna Carta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour. But the statute of King Charles the Second extirpated the whole, and demolished both root and branches.

B. The second species of tenure, or *Free Socage*, consisted also of free honourable services. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. Socage, in its most general and extensive signification, denotes a tenure by any certain service. And in this sense it is, by our antient writers, constantly put in opposition to chivalry, or knight-service, where the service was uncertain. Thus Bracton: "if a man holds by a rent in money, without any escuage or serjeanty, *id tenementum dici potest*

(*n*) This appears to be the meaning of sect. 1 of the Act, which is a monument of bad drafting.

(*o*) Sect. 4.

(*p*) Sect. 7. Sect. 6 expressly saves fines on alienation due by customs of particular manors.

[*socagium*; but if you add thereto any royal service, or escuage to any, the smallest amount, *illud dici poterit feodum militare* (*q*). Littleton also defines socage to be, where the tenant holds by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service (*r*). The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20*s*. rent; or by homage, fealty, and 20*s*. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or by fealty only, without any other service: for all these are tenures in socage (*s*).

But socage, as was hinted earlier in the chapter, is of two sorts: *free*-socage, where the services are not only certain but honourable; and *villein*-socage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil, and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage (*t*). Of this tenure we are now to speak.]

Free-socage was of a strongly feudal character, being created by words of pure donation accompanied with livery of seisin, and being invariably attended with the obligation of fealty at the least, (even where no other service was rendered). Moreover, it was accompanied by many of the incidents attaching to feuds in general, and yet it fell far short of the severity of the tenure in chivalry, not only as being certain in its services, but also as being comparatively mild in some of its fruits and consequences, as will appear from the following comparison of the incidents of knight-service and free-socage tenure.

[1. In the first place, then, both were held of superior

(*q*) L. 2, c. 16, § 9 (fo. 37).
(*r*) Sect. 117.
(*s*) Litt. ss. 117, 118, 119.
(*t*) Glanv. vii. 3. (Glanvil does not, however, tell us what a *liber sokemannus* is.)

[lords; of the king as lord paramount, and sometimes of a subject or mesne lord between the king and the tenant.

2. Both were subject to the feudal return, render, rent, or service of some sort or other. In socage, this was certain, fixed, and determinate, (though perhaps nothing more than fealty), and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant (*u*).] The oath of fealty can, in strictness of law, be exacted from the socage tenant at the present day; but it is usually "respited."

[4. The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter (*x*); which were fixed by the Statute of Westm. I. (1275) cap. 36, at 20*s*. for every 20*l*. per annum so held, as in knight-service. These aids were all abolished by the statute 12 Car. II. (1660) c. 24,] which, however, says nothing about the aid for ransoming the lord's body.

[5. Relief is due upon socage tenure, as well as upon tenure in chivalry; but whereas the relief on a knight's fee was 5*l*., or one quarter of the supposed value of the land, a socage relief is one year's rent, be the same either great or small (*y*). And therefore Bracton will not allow this to be properly a relief, but "*quædam præstatio* loco relevii *in recognitionem domini*" (*z*). So, too, the 28 Edw. I. (1300) c. 1 declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath been used to pay his lord; and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age; but in socage they were due even though the heir was

(*u*) Sect. 131.
(*x*) Co. Litt. 91 a.
(*y*) Litt. s. 126.
(*z*) L. 2, c. 36, § 8 (fo. 35 b.).

[under age, because the lord has no wardship over him (*a*). The statute of Charles the Second reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee simple are holden by a rent, relief is still due of common right upon the death of the tenant.

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service (*b*). But tenancy *in capite*, as well as primer seisins, are also, among the other feudal burdens, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage, but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee; because, in this tenure no military or other personal service being required, there was never any occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant. But the infant's nearest relation, not being one to whom the inheritance can descend, shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen (*c*). At fourteen, this wardship in socage ceases, and the heir may oust the guardian, and call him to account for the rents and profits; for at this age the law supposes the infant capable of choosing a guardian for himself (*d*). It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands of the kingdom were turned into socage tenures, the same statute, 12 Car. II.

(*a*) Litt. s. 127.
(*b*) Co. Litt. 77 a.
(*c*) *Ibid.* 88 b., n. (6).
(*d*) Litt. s. 123; Co. Litt. 89 a.

[(1660) c. 24, enacted, that it should be in the power of any father, by deed or will, to appoint a guardian, till his child should attain the age of twenty-one (*e*). And, if no such appointment be made, the courts interpose to name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (*f*).

8. Marriage, or the *valor maritagii*, was not in socage tenure any advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account for the value of the marriage, even though he took nothing for it (*g*), unless he married him to advantage. For the law made guardians in socage account, not only for what they *did*, but also for what they *might* have received on the infant's behalf. But, the statute of Charles the Second having destroyed all values of marriages, this doctrine has, of course, ceased to apply to the subject.

9. Fines for alienation were, apparently, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service; for the statutes speak generally of all tenants *in capite*, without making any distinction (*h*). But all these fines were taken away by the statute of Charles the Second.

10. Escheat and forfeiture also are equally incident to tenure in socage, as they were to tenure by knight-service.]

Such is the tenure in free socage, being that under which the bulk of real property in this realm is held at the present day, and which is now better known by its modern denomination of *freehold*. It remains only to specify three special varieties of it, viz., *petit serjeanty*, *tenure in burgage*, and *gavelkind*.

[Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the

(*e*) Sect. 8.

(*f*) For recent statutory provisions on this subject, see bk. iii. ch. iv.

(*g*) Litt. s. 123.

(*h*) Co. Litt. 43 a.

[other is a rent or render, both tending to some purpose relative to the king's person (*i*). Petit serjeanty, as defined by Littleton, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like (*j*). This, he says, is but socage in effect; only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or petit serjeanty (*k*). And *Magna Carta* respects it in this light, when it enacts, that no wardship of the lands or body shall be claimed by the king, in virtue of a tenure by petit serjeanty (*l*).

Tenure in *burgage* is described by Glanvil, and is expressly said by Littleton, to be but tenure in socage (*m*); and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain (*n*). And it is indeed only a kind of town socage. Many of these tenements so held in antient burgage are subject to a great variety of customs: the principal and most remarkable of which is that called *Borough-English*, so named in contra-distinction (as it were) to the Norman customs, and which is taken notice of both by Glanville (*o*), and by Littleton (*p*). By this custom, the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. For which Littleton gives this reason, namely, that the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself (*q*). Other special customs there are in different burgage tenures; as that, in some, the wife shall be endowed of *all* her husband's tenements, and not of the third part only (*r*); and that, in others, a man might dispose of his tenements

(*i*) Co. Litt. 107 a., 108 b.
(*j*) Litt. s. 159.
(*k*) *Ibid.* s. 160.
(*l*) Cap. 37 (ed. Stubbs).
(*m*) Litt. s. 162; Glan. lib. 7, ch. 10.
(*n*) Litt. ss. 162, 163.
(*o*) Lib. 7, ch. 10.
(*p*) S. 165.
(*q*) S. 211.
(*r*) S. 166.

[by will (*s*), which, in general was not permitted, after the Conquest, till the reign of Henry the Eighth (*t*).]

Gavelkind is principally met with in the county of Kent, where all lands are presumed to be subject to that custom (*u*); but it is also found elsewhere. To account for this it should be recollected, that the Kentish men obtained concessions from the Conqueror, by the effect of which they were permitted to retain their ancient liberties; and we may fairly conclude that this custom was a part of those liberties. [The distinguishing properties of this tenure are:—1. The tenant at the age of fifteen can aliene his estate by feoffment (*x*). 2. The estate did not escheat in case of attainder and execution for felony; the maxim being, "the father to the bough, the son to the plough" (*y*). 3. In most places the tenant had a power of devising lands by will, before the statute for that purpose was made (*z*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*a*); which was indeed antiently the most usual course of descent all over England (*b*). These, among other properties, distinguished this tenure in a most remarkable manner; and yet it is said to be only a species of a socage tenure, modified by the custom of the country.

C. From the tenure of pure villenage have sprung our present *copyhold* tenures, or tenure by copy of court roll at the will of the lord; in order to obtain a clear idea of which it will be previously necessary to take a short view of the origin and nature of *manors*.

Manors are in substance as antient as the Saxon

(*s*) S. 167.

(*t*) 32 Hen. VIII. (1540), c. 1.

(*u*) *Randall* v. *Writtall* (1673), 3 Keb. 216.

(*x*) Lamb. *Peramb.* 564 (ed. 1596); *In re Maskell and Goldfinch*, [1895] 2 Ch. 525.

(*y*) Lamb. *Peramb.* 551.

(*z*) F.N.B. 198 (*ex gravi querelâ*); *Launder* v. *Brooks*, (1639) Cro. Car. 561.

(*a*) Litt. s. 210.

(*b*) Glanv. lib. 7, ch. 3. (This passage by no means warrants the whole of Blackstone's somewhat sweeping statement.—E. J.)

[constitution, though perhaps differing a little from those which exist at the present day (*c*). A manor, *manerium*, seems to have been a district of ground held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales* or *demesne* lands, being occupied by the lord or *dominus manerii* and his servants. The other, or tenemental, lands they distributed among their tenants; some of whom held in free socage (*d*) and others in villenage (*e*), which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and to his tenants. Manors were formerly called baronies, as they still are called lordships; and each lord or baron was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. And if several manors were held under one great baron, his seignory over them was termed an *honor*.

Villenage was a species of tenure neither strictly feudal, Norman, nor Saxon, but mixed and compounded of them all (*f*). Under the Saxon government, there were, as Sir William Temple speaks (*g*), a sort of people used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. On the arrival of the Normans here, it seems not improbable that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind

(*c*) Co. *Cop.* 2, 10.
(*d*) *Ibid.* 31.
(*e*) *Ibid.* 12, 14.
(*f*) Wright, *Tenures*, 215.
(*g*) *Introd. Hist. Eng.* 58.

[of estate superior to downright slavery, but inferior to every other condition (*h*). This they called villenage, and the tenants villeins, either from the word *vilis*, or else (as Sir Edward Coke tells us) *a villâ*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kind (*i*), like the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or the land; or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another (*k*). They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land, by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices (*l*); and their services were not only base, but uncertain, both as to their time and quantity (*m*). A villein could acquire no property, either in lands or goods; but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*n*).

In many places, also, a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord (*o*); and, by the common law,

(*h*) Wright, *Tenures*, 217.
(*i*) Co. Litt. 116 a.
(*k*) Litt. s. 181.
(*l*) *Ibid.* s. 172.
(*m*) Bracton, L. 4, ch. 28, 35.
(*n*) Litt. s. 177.
(*o*) Co. Litt. 140 a.

[the lord might also bring an action against the husband, for damages in thus purloining his property (*p*). For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* (*q*). In case of a marriage between a freeman and a neife, or between a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius*; and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it (*r*). The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for if the lord should kill or maim them, he was subject to indictment at the king's suit (*s*).

Villeins might be enfranchised by manumission, which was either express or implied; express, as where a man granted to the villein a deed of manumission (*t*), implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, or for life, or for years (*u*); for this was dealing with a villein on the footing of a freeman. So also, if the lord brought an action against his villein, this enfranchised him (*x*); for as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission.

(*p*) Litt. s. 202.
(*q*) *Ibid.* s. 186.
(*r*) *Ibid.* ss. 187, 188.
(*s*) *Ibid.* ss. 189, 194.
(*t*) *Ibid.* s. 204.
(*u*) *Ibid.* ss. 205, 206.
(*x*) *Ibid.* s. 208.

[Villeins, by this and many other means, in process of time gained considerable ground on their lords; and in particular, strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and on performance of the same services, to hold their lands, in spite of any determination of the lord's will. For, though they in general are still said to hold their estates at the will of their lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court-roll*, and their tenure itself a *copyhold* (*y*).

Thus copyhold tenures (as Coke observes), though very meanly descended, yet come of an antient house (*z*); copyholders being in truth no other but villeins (*a*), who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will, which affords a very substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of estates and the privileges belonging to the tenants. And these encroachments

(*y*) F. N. B. 12 C.
(*z*) Co. *Cop.* 32.
(*a*) F. N. B. 12 C.

[grew to be so universal, that, when tenure in villenage was virtually abolished (though copyholds were reserved) by the Statute of Charles the Second, there was hardly a pure villein in the nation. For Sir Thomas Smith testifies (*b*) that in all his time (and he was secretary to Edward the Sixth) he never knew any villein *in gross* throughout the realm; and the few villeins *regardant* that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations in the preceding times of popery.

As a further consequence of what has been premised, we may collect these two main principles, which are held to be the supporters of copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of, and situate within, that manor under which it is held. 2. That they have been demised, or at least demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day (*c*).

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. But the custom of the manor has, in both cases, so far superseded the will of the lord, that, provided the services be performed, or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of the tenant on the latter's death; nor, in the second, can he remove his present tenant so long as he lives, though he holds, nominally, by the precarious tenure of the lord's will.

(*b*) *Commonwealth*, b. 3, ch. 10.

(*c*) Co. Litt. 58. (Even when the custom of the manor allows the lord to grant new copyholds out of the waste, the right can now only be exercised with the consent of the Board of Agriculture. And the land granted at once becomes of socage tenure. Copyhold Act, 1894, s. 81.)

[The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which are generally agreed to be a Danish custom, are a render of the best beast or other good (as the custom may be) to the lord, on the death of the tenant. This is plainly a relic of villein tenure, there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them, even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, in copyhold estates, partakes both of that in chivalry (*d*), and that in socage. For if the lord is guardian (as he may be by special custom), he is not accountable for the rents and profits (*e*). But, in the absence of custom, the guardianship belongs to the next of kin of the infant to whom the copyhold cannot descend; and he, like the guardian in socage, is accountable to his ward for the profits (*f*). Of fines, some are in the nature of *primer seisins*, due on the death of each tenant; others are mere fines for the alienation of the lands. In some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the fines must be *reasonable*, for if otherwise, they might amount to a disherison of the estate. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*g*).

(*d*) *Cole* v. *Walles*, (1591) 1 Leon. 328.

(*e*) *Anonymous*, (1528) *ibid.* 266.

(*f*) This point seems to have been a little doubtful at one time. See *Hughes* v. *Harris*, (1631) Cro. Car. 229.

(*g*) *Morgan* v. *Scudamore*, (1677)

[This much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

D. There is yet a fourth species of tenure, described by Bracton, under the name sometimes of *privileged* villenage, and sometimes of *villein-socage*. This, he tells us, is such as has been held of the kings of England from the Conquest downwards; that the tenants herein "*villana faciunt servitia, sed certa et determinata*"; that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be granted out again and held in villenage (*h*). And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *antient demesne*; to which as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Antient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were in the hands of the Crown in the time of Edward the Confessor or William the Conqueror; and so appear to have been by the great Survey in the Exchequer, called Domesday Book (*i*). The tenants of these lands, under the Crown, were not all of the same order or degree. Some of them, as Britton testifies, continued for a long time pure and absolute villeins, dependent on the will of the lord (*k*); and those who have succeeded them in their tenures, now differ from common copyholders only in a few points (*l*). Others

2 Rep. in Ch. 70; *Astle* v. *Grant*, (1781) Doug. 699 *n*. But see *Fraser* v. *Mason*, (1883) 10 Q. B. D. 398 (affirmed on appeal).

(*h*) L. 4, ch. 28, s. 5 (fo. 209).
(*i*) F. N. B. 14, 16.
(*k*) Bk. II. c. 2, § 12.
(*l*) F. N. B. 228.

[were in great measure enfranchised by the royal favour, being only bound, in respect of their lands, to perform some of the better sort of villein services, but those determinate and certain, as, to plough the king's land, to supply his court with provisions, and the like; all of which are now changed into pecuniary rents. And in consideration hereof, they had many immunities and privileges granted to them (*m*); as, to try the right of their property in a peculiar court of their own, called a court of antient demesne (*n*), by a peculiar process, denominated a writ of *right close* (*o*); not to pay toll or taxes (*p*); not to contribute to the expenses of knights of the shire; not to be put on juries, and the like (*q*).

These tenants, therefore, though their tenure be absolutely copyhold, yet have an interest equivalent to a freehold; for though their services were of a base and villenous original, yet the tenants were esteemed in all other respects to be highly privileged villeins, and especially in this, that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will; "*et ideo*," says Bracton, "*dicuntur liberi*." Britton, also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes to be, "lands and tenements, which are not held by knight-"service, nor by grand serjeanty, nor by petit, but by "simple services, being, as it were, lands enfranchised "by the king or his predecessors, from their antient "demesne" (*r*). And the same name is also given them in Fleta (*s*).]

E. Besides the *lay* tenures above described, there is a spiritual tenure which still subsists, having been reserved

(*m*) 4 Inst. 269.
(*n*) *Alden's Case*, (1601) 5 Rep. 105 b.
(*o*) F. N. B. 11.
(*p*) *The Queen* v. *Aylesford*, (1860) 2 E. & E. 538.
(*q*) F. N. B. 14.
(*r*) Bk. III. c. 2, § 11.
(*s*) Bk. I. ch. 8.

[by the 12 Car. II. c. 24. This is the tenure in *frankalmoign, in liberâ eleemosynâ*, or free alms, and is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever (*t*). The services which they were bound to render for these lands was not certainly defined; but only, in general, to pray for the souls of the donor and his heirs, dead or alive. And therefore they did no fealty (which is incident to all other services but this (*u*)), because this divine service was of a higher and more exalted nature (*x*). This is the tenure by which almost all the antient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day (*y*). It was an old Saxon tenure; and it continued under the Norman revolution, through the great respect that was shown to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all other services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*z*). And this tenure, even at present, is of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it (*a*). Wherein it materially differs from what was called *tenure by divine service*, in which the tenants were obliged to do some special divine services in certain, as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms. Especially as for this, if unperformed,

(*t*) Litt. s. 133.
(*u*) *Ibid.* s. 131.
(*x*) *Ibid.* s. 135.
(*y*) Bract. l. 4, tr. 5, cc. 1, 2 (fo. 285 b).
(*z*) Seld., *Janus Anglorum* I. xlii.
(*a*) Litt. s. 136.

[the lord might distrain, without any complaint to the visitor (*b*). All such donations are, indeed, now out of use; for, since the statute of *Quia Emptores* (18 Edw. I., 1290), none but the king can give lands to be holden of this tenure (*c*).]

(*b*) *Ibid.* s. 137. (*c*) *Ibid.* s. 140.

CHAPTER III.

OF FREEHOLD ESTATES OF INHERITANCE.

[THE next objects of our disquisitions are the nature and properties of *estates*. An estate in land signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*d*). It is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view; first with regard to the *quantity of interest* which the tenant has in the tenement: secondly, with regard to the *time* at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the *number* and *connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary divisions of estates into such as are *freehold*, and such as are *less than freehold*.]

An estate of freehold, *liberum tenementum*, or frank tenement, is an estate either of inheritance or for life, held by free tenure (*e*); and it is material to our proper

(*d*) Co. Litt. 345 a. (*e*) *Ibid.* 43 b.

[conception of it to remark, that at the common law, and prior to certain alterations in our system to be hereafter explained, an estate of this description could in general be created or transferred only by the ceremony called *livery of seisin*, attended with proper words of donation; which ceremony consisted, as its name imports, of a solemn delivery of possession, and was in fact the feudal investiture of which we spoke in the last chapter. And this method of conveyance is still capable of being used, and is called a *feoffment*, the parties between whom it takes place being called respectively the *feoffor* and the *feoffee*.] By the common law, the donation with which the livery is accompanied might be merely oral; but, by the Statute of Frauds (*f*), some instrument in writing, under the signature of the feoffor (or his agent by writing lawfully authorized), was made requisite. And a deed is now required by the Real Property Act, 1845 (*g*).

[Estates of freehold, then, are divisible into estates of *inheritance*, and estates *not of inheritance*. The former are again divided into inheritances *absolute*, or fee simple; and inheritances *limited*, one species of which we usually call *fee-tail*.

I. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, and hereditaments, to hold to him and his heirs for ever; generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law (*h*). The true meaning of the word fee, *feodum*, is the same with that of feud or fief, and in its original sense it is taken in contradistinction

(*f*) 29 Car. II. (1677) c. 3, s. 1.

(*g*) 8 & 9 Vict. c. 106, s. 3.

(*h*) It is, of course, no longer necessary, in the conveyance of a fee-simple by deed, that the exact words "and his heirs" should be employed. The alternative is "in fee simple." (Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51.) And in a will, any words indicative of the testator's intention to pass a fee simple will be sufficient. (Co. Litt. 9 b.)

[to *allodium*, or absolute ownership; it being a received and now undeniable principle in the law, that all the lands in England are holden mediately or immediately of the king. The king alone therefore has the *absolutum et directum dominium* (*i*); and all subjects' lands are in the nature of *feodum* or fee. But, as Sir Martin Wright observes, the doctrine "that all lands are holden" having been for so many ages a fixed and undeniable axiom, our modern English lawyers do very rarely use the word *fee* in that its primary sense, but generally use it to express the continuance or quantity of estate (*k*). A *fee*, therefore, in general, signifies an estate of inheritance (*l*), being the highest and most extensive interest that a man can have in a feud.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee simple. Yet sometimes the fee may be in *abeyance*, that is, (as the word signifies,) in expectation, remembrance, and contemplation in law; and this happens where there is no person *in esse*, in whom it may vest and abide, though the law considers it as always potentially existing (*m*). Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly granted neither to John nor Richard, nor can it vest in the heirs of Richard till his death; for *nemo est hæres viventis*. It remains therefore in waiting, or abeyance, during the life of Richard.

The word "heirs" used to be necessary in the grant or

(*i*) *Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.*—Co. Litt. 1 b.

(*k*) Wright, *Tenures*, 148.

(*l*) Litt. s. 1.

(*m* Co. Litt. 342 b; Litt. ss. 646, 647; *Cumoys Peerage Case*, 5 Bing. N. C. 763.

[donation, in order to make a fee or inheritance; for if the land was given to a man for ever, or to him and his assigns for ever, this vested in him but an estate for life (*n*). This very great nicety about the insertion of the word "heirs" in all feoffments and grants was a relic of the feudal strictness, by which it was required that the form of the donation should be punctiliously pursued (*o*). And, therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life, unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.] But now, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, it is no longer necessary to use the word "heirs" in any deed; but it is sufficient to say that the conveyance is "in fee simple." And long before the date of that statute the rigor of the rule had been modified by several exceptions, of which the two following were the most important.

In grants of land to corporations sole and their successors, the word "successors" supplied the place of "heirs"; for, as heirs take from the ancestor, so doth the successor from the predecessor. But, even in a grant to a bishop, or other sole spiritual corporation, in *frankalmoign*, the word "*frankalmoign*" supplied the place of both "heirs" and "successors"; and, in such a case a fee simple vested in such sole corporation. And, in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for, as the corporation never dies, such estate is perpetual or equivalent to a fee simple; and therefore the law allows it to be one (*p*).

And the old feudal rule never extended to dispositions *by will*,—in which, as they were introduced at a time

(*n*) Litt. s. 1.

(*o*) Craig, *Jus Feudale*, L. 1, t. 10, s. 7.

(*p*) Co. Litt. 9 b, 94 b.

[when the feudal rigour was fast wearing out, a more liberal construction has always been allowed. And therefore, by a devise to a man "for ever," or to one "and his assigns for ever," or to one "in fee simple," the devisee has always been construed to have an estate of inheritance, because the intention of the devisor was sufficiently plain from the words of perpetuity annexed, though he had omitted the legal words of inheritance. If, however, the devise were simply to a man "and his assigns," without annexing any words of perpetuity, the devisee was, at one time, held to take only an estate for life;] but now, by the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 28, where any real estate shall be devised without words of limitation, the devise will pass the whole interest of the testator, *unless* a contrary intention appears by the will.

[II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And this we may divide into two kinds: 1. *Qualified* or *base* fees; and 2. Fees *conditional*, so called at the common law; and afterwards fees *tail*, in consequence of the statute *De Donis*.

1. A *base*, or qualified, fee is such a one as has a qualification subjoined thereto, and must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs *tenants of the manor of Dale;* here, whenever A. or the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. So, when Henry the Sixth granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and the instant he or his heirs quitted the seignory of this manor the dignity was at an end (*q*). This estate is a fee, because by

(*q*) Co. Litt. 27 a.

[possibility it may endure for ever in a man and his heirs; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or *base* fee (*r*).

2. A conditional fee at the common law was a fee restrained to some particular heirs, exclusive of others (*s*); as to the heirs *of a man's body*, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs *male of his body*, in exclusion both of collaterals and of lineal females also. Now our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body (*t*). They therefore called it a fee simple on condition that the donee had issue. So that, as soon as the donee had any issue *born*, his estate was supposed to become absolute by the performance of the condition (*u*); at least for these three purposes: 1. To enable the donee to aliene the land, and thereby to bar not only his own issue, but the donee of his interest in the reversion (*x*); 2. To subject the donee to forfeit his estate for treason, which till issue born he was not able to do, except for the period of his own life; for otherwise the inheritance of the issue, and the reversion of the donor, might have been defeated (*y*); 3. To empower the donee to charge the land with rents, commons, and other incumbrances, so as to bind his issue (*z*). And this was thought the more reasonable, because, by the birth of issue, the possibility

(*r*) The term *base* fee has also a more restricted application, as denoting that species of qualified fee which is created where tenant in tail conveys his estate tail by a conveyance which bars the issue, but not the remaindermen; and in the Fines and Recoveries Act, 3 & 4 Will. IV. (1833) c. 74, the meaning of the phrase *base fee* is, but only for the purpose of the Act, so restricted.

(*s*) Flet. L. 3, ch. 3, s. 5.

(*t*) *Willion* v. *Berkley*, (1562) Plowd. 241.

(*u*) *Nevil's Case*, (1604) 7 Rep. 34 b.

(*x*) Co. Litt. 19 a; 2 Inst. 333; *Doe* v. *Clark*, (1822) 5 B. & Ald. 461.

(*y*) Co. Litt. *ubi sup.*; 2 Inst. 334.

(*z*) Co. Litt. *ubi sup.*

[of the donor's reversion was rendered more distant and precarious: and his interest seems to have been the only one which the law, as it then stood, was solicitous to protect, without much regard to the right of succession intended to be vested in the issue. However, if the donee did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for, if the issue had afterwards died, the land by force of the condition reverted to the donor. For which reason, in order to subject the land to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue; and afterwards repurchased the land, which gave them a fee simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says Sir Edward Coke, though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such-like inheritances, which are not within the statutes of entail, and therefore remain as at the common law (*a*).

The inconvenience, which attended these limited and fettered inheritances, was probably what induced the judges to give way to this subtle finesse (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But the nobility put a stop to this construction of the limitation, by procuring the Statute of Westminster the Second (commonly called the statute *De donis conditionalibus*) to be made (*b*); by which statute it was enacted, that thenceforth the will of the donor should be observed *secundùm formam doni*, so that, where lands were given to a man and the heirs

(*a*) Co. Litt. 20 a; *Moore* v. *Lord Plymouth*, (1817) 7 Taunt. 614. [This case did not, in fact, decide that the alleged entail of a *profit à prendre* was valid.—E. J.]

(*b*) 13 Edw. I. (A.D. 1285), c. 1.

[of his body, they should, notwithstanding any alienation by the donee, go to his issue, if there were any, and if issue failed, should revert to the donor. And the judges soon afterwards determined that, under such a limitation, and upon the true construction of the Act, the donee had no longer a conditional fee simple, but a *fee-tail* (*c*), leaving in the donor the ultimate fee simple (*d*). And hence it is that Littleton tells us (*e*) that tenant in fee-tail is by virtue of the Statute of Westminster the Second.

Having thus shewn the *original* of estates-tail, we now proceed to consider *what things* may, or may not, be entailed under the statute *De Donis*. *Tenements* is the only word used in the statute; and this Sir Edward Coke (*f*) expounds to comprehend all corporeal hereditaments whatsoever, and also all incorporeal hereditaments which savour of the realty, that is, which come out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. But mere personal chattels, which savour not at all of the realty, cannot be entailed. Neither can an office which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands of the grantor. But in them, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at the common law, as before the statute; and by his alienation may bar the heir or reversioner (*g*).

Next, as to the several *species* of estates-tail, and how they are respectively created.

(*c*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from the feudists; among whom it signified any mutilated or truncated inheritance, being derived from the barbarous verb *talliare*, to cut.—Spelm. *Gloss.* ad verb. *Feodum*; Craig, *Jus Feudale*, L. 1, t. 10, ss. 24, 25.

(*d*) 2 Inst. 335.

(*e*) S. 13.

(*f*) Co. Litt. 19 b, 20 a.

(*g*) *Ibid.* 20 a.

[Estates-tail are either *general* or *special.* Tail-general is where lands and tenements are given to one and the *heirs of his body* begotten; which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate tail *per formam doni* (*h*). Tenant in tail special, is where the gift is restrained to certain heirs of the donee's body by a particular person; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten.* Here no issue can inherit but such special issue as is engendered between them two; not such as the husband may have by another wife. And therefore it is called special tail (*i*).

Estates in general and special tail are further diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or in tail *female.* As if lands be given to a man and the *heirs male of his body* begotten, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *è converso* the heirs male, in case of the gift in tail female (*k*). Thus, if the donee in tail male hath a daughter who dies leaving a son, such grandson in this case cannot inherit the estate tail; for he cannot deduce his descent wholly by heirs male (*l*). And, therefore, if a man hath two estates-tail, the one in tail male the other in tail female, and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates. For he cannot convey his descent wholly either in the male or in the female line (*m*).

As the word *heirs* used to be necessary, in a deed, to

(*h*) Litt. ss. 14, 15.
(*i*) *Ibid.* s. 16.
(*k*) *Ibid.* ss. 21, 22.
(*l*) *Ibid.* s. 24; Co. Litt. 25 b.
(*m*) *Ibid.*

[create a fee, so the word *body* (or some other words of procreation) (*n*) used to be necessary to make it a fee-tail. If, therefore, either the words of inheritance or the words of procreation were omitted, albeit the others were inserted in the grant, this would not make an estate-tail. For example, if the grant were to a man and the *issue of his body*, to a man and his *seed*, to a man and his *children* or *offspring*; all these would be but estates for life, there wanting the words of inheritance, "his heirs" (*o*). So, on the other hand, a gift to a man and his *heirs male*, or *heirs female*, was an estate in fee-simple, and not in fee-tail; there being no words to ascertain the *body* out of which they should issue (*p*).

Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate tail could always (when devises were allowed at all) be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression (*q*).] And now, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, it is no longer necessary, for the creation of an estate tail by deed, to use the words "heirs of the body"; but it suffices to say "in fee tail," with or without the word *male* or *female*, as may be required.

[Save in the power of alienation, the tenant in tail had all the rights, and his estate was subject to most of the incidents of an estate in fee simple. Thus, the tenant in-tail might, with impunity, commit waste of the land. His widow was entitled to dower; and the husband of a deceased tenant in-tail to curtesy. To this rule there was but one exception, in the case of the *tenant in tail after possibility of issue extinct*, to be hereafter explained. But it was not until the reign of Henry VIII. that the estate

(*n*) *Beresford's Case*, (1607) 7 Rep. 40.

(*o*) Co. Litt. 20 b.

(*p*) Litt. s. 31; Co. Litt. 27 a; *Abraham* v. *Twigg*, (1596) Cro. Eliz. 478; *Earl of Oxford's Case*, (1625) W. Jones, 105.

(*q*) Co. Litt. 9 b, 27 a.

[tail was rendered liable to forfeiture for treason, and it was never forfeitable for the felony of the tenant-in-tail (*r*).

Estates tail proved to be the occasion of infinite difficulties and disputes (*s*). Children grew disobedient when they knew they could not be disinherited. Farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, they would have virtually disinherited the issue. Creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might have defeated his issue by mortgaging it for as much as it was worth. Innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought. Treasons also were encouraged, as estates tail were not at first liable to forfeiture longer than the tenant's life. In fact, entails were justly branded as a source of new contentions, unknown to the common law, and were almost universally considered as a common grievance of the realm (*t*). But as the nobility were always fond of the statute *De Donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature. And, therefore, it was necessary, as the statute could not be repealed, to devise a method of evading it.

The method resorted to was the decision of the judges in *Taltarum's Case* (*u*), wherein it was (in effect) admitted, that a common recovery suffered by tenant in tail would convert his estate into a fee simple absolute, and bar all persons claiming the estate tail, or any estate ulterior thereto; and in consequence of that declaration, a common recovery came to be looked upon as the legal mode of conveyance by which a tenant in tail might effectually

(*r*) Litt. s. 747.

(*s*) *Chudleigh's Case*, (1589) 1 Rep. 131 b.

(*t*) Co. Litt. 19 b; *Mary Portington's Case*, (1613) 10 Rep. 38.

(*u*) Year Book, 12 Edw. IV., (1472) Mich. pl. 16 and 25, fo. 14 and 19.

[dispose of the fee simple of his lands and tenements. What common recoveries were, and why they were allowed to be a bar to the estate tail, must be reserved to a subsequent enquiry. At present we shall only say, that they were fictitious proceedings, introduced by a kind of *pia fraus;* and that these recoveries, however clandestinely begun, at length became, by long use and acquiescence, a most common assurance of lands.] And, although the cumbrous forms of the common recovery have been abolished by a statute of the year 1833 (*x*); the rules of law established by the use of them and the kindred conveyance, known as a *fine*, are carefully preserved, and, in fact, govern the alienation of estates tail at the present day.

[This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented, to strip them of other privileges. The next that was attacked was their freedom for forfeitures for treason. This privilege was destroyed by a statute of the year 1534 (26 Hen. VIII. c. 13), whereby all estates of inheritance (under which general words estates-tail were covertly included) were declared to be forfeited to the king for any conviction of high treason.

The next attack which they suffered, in order of time, was by the 32 Hen. VIII. c. 28, passed in the year 1540, whereby certain leases made by tenants in tail, not tending to the prejudice of the issue, were allowed to bind the issue in tail, though not the remainderman or reversioner (*y*). But they received a more violent blow by another statute of the same year, 32 Hen. VIII. c. 36, whereby it was declared that a *fine*, when duly levied by a tenant in tail, should bind, not only the tenant in tail himself, but also his heirs and all other persons claiming under the entail. Also, by the 33 Hen. VIII. (1541) c. 39, s. 75, estates-tail were rendered liable to be charged

(*x*) Fines and Recoveries Act (3 & 4 Will. IV. c. 74).

(*y*) Co. Litt. 45 b.

[with the debts of the tenant in tail due to the king by record or specialty contract; by the construction put upon the 43 Eliz. (1601) c. 4, the tenant in tail was enabled to convey the fee simple to a charitable use (*z*); and by the 21 Jac. I. (1623), c. 19, s. 12, the estate tail, in case the tenant in tail was made a bankrupt, became liable for his debts generally.

Estates tail, being thus by degrees unfettered, were reduced again to almost the same state, even before issue born, as conditional fees were in at the common law, after the condition was performed by the birth of issue.] The chief differences between an estate-tail and an estate in fee-simple, are in fact only these, that the tenant in tail cannot dispose of any interest by will, and that, in order to bind his issue and the remainderman, he must use the forms provided by the Fines and Recoveries Act, 1833 (*a*), hereafter to be explained (*b*).

(*z*) *Attorney-General* v. *Rye*, (1703) 2 Vern. 453.

(*a*) 3 & 4 Will. 4, c. 74.

(*b*) *Post*, bk. ii., pt. i., ch. xix.

CHAPTER IV.

OF FREEHOLD ESTATES, NOT OF INHERITANCE.

[We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And, of these, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law (*c*).

I. Estates for life, expressly created by deed or grant (which alone are properly conventional) are, where a lease is made of land or tenements, to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases, he is styled tenant for life; only, when he holds the estate for the life of another, he is usually called tenant *pur auter vie* (*d*). These estates for life are, like inheritances, of a feudal nature: and they were for some time the highest estate that any man could have in a feud, for feuds, (as we have before seen) were not, at first, hereditary. They were, originally, conferred by the same feudal rites and solemnities, the same investiture or livery of seisin, as fees themselves were; and they are held by fealty, and such rents and services as the lord or lessor, and his tenant or lessee, have agreed on.] Consequently, although, at the present day, feoffments have almost disappeared from practice, the estate for life is created and transferred in the same manner as an estate in fee, viz., by *deed*.

[Estates for life may also be created by a grant which does not define or limit the specific estate intended by the grant. As if one grants to A. B. the manor of Dale, this

(*c*) Wright, *Tenures*, 190. (*d*) Litt. s. 56.

[makes A. B. tenant for life (*e*). For the grant will be construed to be as large an estate as the words of the donation will bear, and, therefore, an estate for life. Also, such a grant, for term of life generally, shall be construed to be an estate for life *of the grantee*, in case the grantor hath authority to make such a grant (*f*). For an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of grants by the Crown (*g*).

Estates for life endure, in general, as long as the life for which they are granted; but some estates for life may determine sooner. For, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice, in these, and similar cases, whenever the contingency happens, (when the widow marries, or when the grantee obtains a benefice), the respective estates are absolutely determined and gone (*h*). Yet, while they subsist, they are reckoned as estates for life (*i*).

The estate for life (whether conventional or legal) has the following incidents :—

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take, upon the land demised to him, reasonable *estovers* or *botes*. And these *estovers* or *botes* are of three kinds, viz., *housebote*, which is for repairs and fuel; *ploughbote*, which is for repair of the instruments of husbandry used on the land; and *haybote*, which is for the repair of ancient hedges, or *hays* (*k*).

2. But every tenant for life is, in the absence of authority, answerable for *waste*, that is, for any spoil or destruction which he does to the premises during his tenancy, to the injury of the person entitled to the

(*e*) Co. Litt. 42 a.
(*f*) *Ibid.* and 183 a.
(*g*) *Ibid.*
(*h*) *Ibid.*; *Boraston's Case*, (1587) 3 Rep. 19 a.
(*i*) Co. Litt, 42 a.
(*k*) *Ibid.* 41 b.

[inheritance in reversion or in remainder (*l*).] And there are two kinds of waste, *voluntary* and *permissive*; the one by the tenant's voluntary act, as where he pulls down a wall, or cuts down timber, the other by his default, as by suffering a wall to fall down for want of repairs. The ordinary tenant for life is not responsible for permissive waste (*m*). But the person on whom the enjoyment of a leasehold interest is settled for his life must, probably, perform the covenants of the lease, although the settlor's estate may also be liable (*n*). Estates for life are sometimes limited, however, with a clause expressing that the tenant shall hold the land *without impeachment of waste*, the effect of which is, that he is not liable to an action for waste of either kind, whether voluntary or permissive. But, even in such a case, a court of equity would, formerly, have interfered to restrain the felling of ornamental timber or other like unwarrantable and gratuitous injury to the inheritance, although such acts might not be legal waste at all (*o*). And now, by the Judicature Act, 1873, it is expressly provided that an estate for life, without impeachment of waste, shall not confer on the tenant for life any right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating the estate (*p*).

3. [Tenant for life shall not be prejudiced by any sudden determination of his estate, where such determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his representatives shall have the *emblements*, or profits of the crop so sown; for the estate was determined by the act of God, and *actus Dei nemini facit injuriam* (*q*). The

(*l*) Co. Litt. 53 a.

(*m*) *Re Cartwright*, (1889) 41 Ch. D. 532.

(*n*) *Re Fowler*, (1881) 16 Ch. D. 723.

(*o*) *Vane* v. *Lord Barnard*, (1716) 2 Vern. 738.

(*p*) 36 & 37 Vict. c. 66, s. 25, sub-s. (3).

(*q*) Co. Litt. 55 b.

[representatives, therefore, of the tenant for life shall have the emblements, to compensate for the labour and expense of tilling, manuring, and sowing the lands, as well as for the encouragement of husbandry, which is of public utility. So it is also, if a man be tenant for the life of another, and *cestui que vie*, that is to say, he during whose life the land is held, dies after the corn sown; the tenant *pur auter vie* shall have the emblements. And if a life estate be determined by act of law, *e.g.*, if a lease is made to husband and wife during coverture, and the husband sows the land, and afterwards before the harvest there is a divorce, in such case the husband shall have the emblements; for the sentence of divorce is an act of the law (*r*). But, if a life estate be determined by the tenant's *own act* (as if tenant during widowhood should think proper to marry), in these, and similar cases, the tenants having thus determined the estate *by their own acts*, shall not be entitled to take the emblements (*s*). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; but it is otherwise of fruit-trees, grass, and the like, which are not planted annually at the expense and labour of the tenant, but are either the permanent or natural profit of the earth (*t*). For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to future successions of tenants. The right to emblements was extended to the parochial clergy by the statute 28 Hen. VIII. (1536), c. 11, s. 6; for a parson may be considered as tenant for his own life (*u*).

4. If a tenant for life under-let, his lessee (*i.e.*, the under-lessee) has, by the common law, the same right of

(*r*) *Oland's Case*, (1602) 5 Rep. 116 b. (Probably, since the Married Women's Property Act, 1882, the wife would be entitled to a share.)

(*s*) *Oland's Case*, *ubi sup.*

(*t*) Co. Litt. 55 b.

(*u*) *Quære:* Did this statute do more than confer upon incumbents the power of bequeathing emblements by will?

[emblements (*x*); nor will he lose that right, where the tenant for life by his own act determines his life estate. And therefore in the case of a woman who holds *durante viduitate*, although her taking husband is her own act, and deprives her of the emblements; yet, if she have leased to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the under-tenant of his emblements (*y*).] But the whole subject of emblements, as regards under-lessees, has been much reduced in practical importance by the passing of the Landlord and Tenant Act, 1851, which provides that, as regards a tenant of a farm or lands at a "rack" or full rent, where the interest of such a person is determined by the death of his lessor, the tenant shall continue to hold until the expiration of the current year of his tenancy; at which time he shall quit, upon the terms of his holding, in the same manner as if his tenancy were determined by effluxion of time or other lawful means during the continuance of his landlord's estate. And the succeeding owner is, in such a case, entitled to recover a fair proportion of the rent for the period elapsed from the termination of his predecessor's interest to the time of the tenant's quitting. And the succeeding owner and tenant respectively are to be entitled (as against each other) to all the benefits, and are to be subject to all the terms, to which the original landlord and tenant respectively would have been entitled or subject, in case the tenancy had determined in manner aforesaid at the expiration of such current year. And these provisions are in lieu of emblements.

By the Apportionment Act, 1870 (*z*), it has been provided generally, and not merely in reference to life tenants and their under-lessees, that all rents, annuities, dividends, and other periodical payments in the nature of income, (whether reserved or made payable under an instrument in writing or otherwise,) shall, like interest

(*x*) Co. Litt. 55 b.
(*y*) *Ibid.*
(*z*) 33 & 34 Vict. c. 35.

on money lent, be considered *as accruing from day to day*, and shall (in the absence of an express stipulation to the contrary) be apportionable in respect of time accordingly. But, in the case of rent, the entire amount payable on the usual day is received by the person then entitled to the reversion; the proportion due to any former owner being recoverable by the latter, or his representative, from the person who has received it. And, of course, no claim can be made against the lessee, in respect of rent, until such rent is actually payable by the terms of the tenancy.

[II. The next estate for life is of the legal kind, as contradistinguished from the conventional. This is the estate of *tenant in tail after possibility of issue extinct*, which arises, where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or (having left issue) that issue becomes extinct. In either of these cases, the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct (*a*). And the law makes use of this long periphrasis in order to give an adequate idea of his estate. For he has no longer an estate of inheritance, seeing that he can have no heirs capable of taking *per formam doni*. Nor yet is he merely *tenant in tail without issue*, for that would not have excluded the possibility of future issue. And lastly, he is not *tenant in tail without possibility of issue*, because he might at one time have had issue. But he is *tenant in tail after possibility of issue extinct;* which phrase not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished for ever.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man

(*a*) Litt. s. 32.

[and his wife, and the heirs of their two bodies begotten, and they are divorced, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance which was once vested in them (*b*). The estate is of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. For, besides the name of tenant in tail, the tenant is so far in the condition of a tenant in tail, properly so called, as to be dispunishable for waste (*c*); and he formerly enjoyed some other of the privileges of a tenant in tail, connected with branches of the law which have now become extinct (*d*). On the other hand, his estate has always been considered for practical purposes as equivalent to an estate for life only; wherefore the law always permitted a tenant in tail of this description, and an ordinary tenant for life, to make mutual alienation of their estates, by that particular method of conveyance called an *exchange*, a conveyance applicable only in the case of estates that are equal in their nature (*e*).

III. Tenancy *by the curtesy of England* is the estate for life which a man has, on the death of his wife, in the lands and tenements of which during the marriage she was seised for any estate of inheritance. And the husband is by law entitled to this estate, provided he has had issue by her born alive during the marriage, and capable of inheriting her estate (*f*).

The estate by the curtesy is said, in the Mirrour, to have been introduced by King Henry the First (*g*). And the reason for the law investing the husband with this

(*b*) Co. Litt. 28 a. (In Coke's time there could have been no legal issue of such a marriage, for an alleged marriage could only be dissolved on the ground of nullity. Probably now, if there were issue begotten before the divorce, the divorce would have no effect on the estate tail.—E. J.)

(*c*) Co. Litt. 27 b.

(*d*) *Ibid.*

(*e*) *Ibid.* 28 a. As to an exchange, *vide post*, bk. II. pt. I. ch. xvii.

(*f*) Litt. ss. 35, 52

(*g*) Cap. 1, s. 3.

[estate, is because when a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is entitled to the profits of the lands, in order to maintain the child. As soon therefore as any child was born, the father acquired a permanent interest in the lands, becoming thereupon one of the *pares curtis*, and doing homage to the lord. He was thus tenant by the curtesy *initiate;* and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the child.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife (*h*). 1. The marriage must be a legal one. 2. The seisin of the wife must be an actual seisin, and not a bare right to possess; not a seisin *in law*, but a seisin *in deed*. Nor may it be an estate in remainder or reversion on a freehold (*i*). But the wife's estate may be either legal or equitable (*k*); and of incorporeal hereditaments, *e.g.*, an advowson, or a common of pasture, a man may be tenant by the curtesy (*l*). 3. The issue must be born alive; and if the child be heard to cry, that is the strongest evidence of its being born alive, but is not the only evidence (*m*). The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy. Because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in the mother's womb; and the estate being once so vested, shall not afterwards be divested (*n*). The issue must also be such as is capable of inheriting the mother's

(*h*) Co. Litt. 30 a.
(*i*) *Ibid.* 29 a.
(*k*) *Sweetapple* v. *Bindon*, (1705) 2 Vern. 536; *Casborne* v. *Scarfe*, (1737) 1 Atk. 603 (2 Wh. & T. 6).
(*l*) Co. Litt. 29 a.
(*m*) Dyer, 25 b.
(*n*) Co. Litt. 29 b.

[estate (*o*); and therefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not entitled to be tenant by the curtesy, because such issue female can never inherit the estate in tail male. The time when the issue was born is immaterial, provided it were during the coverture; for whether it were born before or after the wife's seisin of the lands, and whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*p*). 4. The husband by the birth of the child becomes, as was before observed, tenant by curtesy *initiate*, and may do many acts to charge the lands (*q*); but his estate is not *consummate* till the death of the wife, which is the fourth and last requisite to make a complete tenant by the curtesy (*r*).]

When the wife's estates are held, as they now generally are, to the separate use of the wife, she may defeat the husband's curtesy, either by deed or will disposing of the estates (*s*). But in so far as they are not disposed of, the husband's claim to curtesy remains, notwithstanding the language of the Married Women's Property Act (*t*).

[III. Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case the wife shall have the third part of all the lands and tenements whereof he died seised (except so far as he has disposed of them by his will or encumbered them in his lifetime) to hold to herself for the term of her natural life (*u*).

Dower is called in Latin *doarium*, and by Bracton and our English writers *dos;* but there is little resemblance between the Roman *dos* and the English dower, the origin

(*o*) Litt. s. 52.
(*p*) Co. Litt. 29 b.
(*q*) *Ibid.* 30 a.
(*r*) *Ibid.*
(*s*) *Cooper* v. *Macdonald*, (1877) 7 Ch. D. 288.
(*t*) *Hope* v. *Hope*, [1892] 2 Ch. 336.
(*u*) Litt. s. 36.

[of which is certainly to be found in local custom, native or imported. In treating of this estate, let us first consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced, *a vinculo matrimonii*, she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*x*). But a divorce *a mensâ et thoro* (or, as we should now say, a judical separation,) does not destroy the dower, not even though the divorce was for adultery itself (*y*). But, by the Statute of Westminster the Second (1285), c. 34, if a woman voluntarily leave her husband, and live with an adulterer, she loses her dower, unless her husband is voluntarily reconciled to her.

Also, by the old common law, the wife of a person attainted could not be endowed, to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may (*z*); though Britton gives it another turn, viz., that it is presumed the wife was privy to her husband's crime (*a*). But the 1 Edw. VI. (1547), c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower; and the 5 & 6 Edw. VI. (1551), c. 11, s. 13, which revived the severity of the old law, revived it only against the widows of attainted *traitors*, and not the widows of attainted *felons*.] It is presumed that, since the passing of the Forfeiture Act, 1870, no widow can be deprived of her dower by the conviction of her husband for felony or treason.

(*x*) Co. Litt. 32 a; *Frampton* v. *Stephens*, (1882) 21 Ch. D. 164.
(*y*) Co. Litt. 32 a, 33 b.
(*z*) P. C. bk. III. ch. 33.
(*a*) Bk. I. c. vi. (5) ed. Nicholls.

[2. We are next to enquire of what a widow may be endowed. By the common law, she was entitled to her dower out of all the lands and tenements of which her husband was solely seised in fee simple or in fee tail at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir (*b*). Therefore, if a man, seised in fee simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds the lands to him and the heirs of his body, begotten on Jane his wife, though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed out of the lands. For no issue that she could have could by any possibility inherit them (*c*). A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands (*d*).] But a widow's position in regard to dower has now been greatly altered by the provisions of the Dower Act, 1833 (*e*), which puts it in the power of the husband to defeat her claim by any alienation, partial or complete, during his lifetime or by his will, or by any declaration in a deed or will to the effect that she shall not be entitled to dower out of his land, or any part thereof. On the other hand, subject to this power of deprivation, the widow is now entitled to dower out of the equitable interests, to the enjoyment of which her husband was beneficially entitled at the time of his decease, as

(*b*) Litt. ss. 36, 53. The right attached to incorporeal as well as to corporeal hereditaments, with certain exceptions. (See Co. Litt. 31 b, 32 a.)

(*c*) Litt. s. 53.

(*d*) Co. Litt. 31 a.

(*e*) 3 & 4 Will. IV. c. 105, ss. 4—9.

well as out of claims not enforced by him during his lifetime (*f*).

[3. Next, as to the *manner* in which a woman is to be endowed. There were, formerly, many species of dower; some of which have become entirely obsolete, and others have been abolished by express statute. So that there remain at present only two kinds, viz., dower by the common law, and dower by special custom. Postponing an account of the latter till we reach the subject of the interests specially affected by it, we proceed here to deal with *dower at the common law*.

By the old law, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence, lest she should contract herself to the lord's enemy (*g*). And lords would sometimes force the dowager to a second marriage, in order to gain the fine; until it was provided by *Magna Carta*, that the widow should pay nothing for her marriage, nor be distrained to marry afresh, if she chose to live without a husband (*h*). And it was further provided by that Act, that nothing should be taken for the assignment of the widow's dower; but that she should remain in her husband's capital mansion-house for forty days after his death, during which time, called her *quarentine*, her dower should be assigned. In an assignment of dower, it was required that the particular lands should be assigned by the heir of the husband, or by his guardian (*i*); not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation completed by this investiture or assignment (*k*). If the

(*f*) *Ibid.* ss. 2, 3.
(*g*) *Mirror*, cap. 1, s. 3.
(*h*) Cap. 7 (ed. Stubbs).
(*i*) Co. Litt. 34 b, 35 a.
(*k*) Gilb. *Tenures*, 173.

[heir or his guardian do not assign the widow her dower within the term of quarentine, or if they assign it unfairly, the widow has her remedy by action, and the sheriff or commissioners are directed to assign it (*l*). On the other hand, if the infant heir or the guardian assign too much, the heir has his remedy, formerly by *writ of admeasurement*, now by ordinary action, to recover the excess (*m*). If the thing of which the widow is endowed is divisible, her dower must, if she desires it, be set out by metes and bounds. But if it is indivisible, she must be endowed specially, as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, or the like (*n*).

4. How dower may be *barred*, or prevented. A widow may be barred of her dower, not only by elopement, divorce, and other disabilities before mentioned, but also by detaining the title-deeds of the estate from the heir, until she restores them (*o*). Her right is also, now, as was previously explained, entirely subject to the alienation or declaration of the husband, effected or made during his lifetime or by his will. But another method of barring a widow's dower, common in former times, though not now so usual, was by the settlement upon her of a jointure.

A jointure is defined by Sir Edward Coke as "a competent livelihood of freehold for the wife, of lands or "tenements, to take effect presently in possession or "profit after the decease of the husband, for the life of "the wife at least" (*p*). This description is framed from the purview of the 27 Hen. VIII. c. 10, commonly called the Statute of Uses, passed in the year 1535, which provided that, upon the husband's making or procuring

(*l*) Co. Litt. 34 b, 35 a.

(*m*) F. N. B. 148; Finch, *Discourse*, 314; Stat. Westr. II. (1285) 13 Edw. I. c. 7.

(*n*) Co. Litt. 32 a.

(*o*) *Anne Bedingfield's Case*, (1586) 9 Rep. 15 b.

(*p*) Co. Litt. 36 b.

[to be made such an estate in jointure to the wife before marriage, she should be for ever precluded from her dower (*q*). But then these four requisites must be punctually observed. 1. The jointure must take effect immediately on the death of the husband. 2. It must be for the wife's own life at the least, and not for any smaller estate. 3. It must be made to herself, and to no other in trust for her. 4. It must be made, and so in the deed particularly expressed, to be in satisfaction of her whole dower, and not of any particular part of it (*r*). At least this was the rule at law; but in equity, any provision accepted by a woman (not being an infant) *before* her marriage, in lieu of dower, was a good bar (*s*). If the jointure was made to her *after* marriage, she had her election after her husband's death, and might either accept it or refuse it, and betake herself to her dower at common law; for she was not capable of consenting to it during the coverture (*t*). Also if, by any fraud or accident, a jointure, made before marriage, proved to be on a bad title, and the jointress was evicted, then, by the express provisions of the same statute, she was to have her dower, *pro tanto*, at the common law (*u*).]

Independently of the bar of dower by way of jointure, if the husband made any provision for his wife by will or otherwise, in such a manner as clearly to indicate an intention that the provision so made should be taken in lieu of dower, she was barred by her acceptance, after his death, of the provision so made, though she had an option or election to accept it or not (*v*).

(*q*) *Vernon's Case*, (1572) 4 Rep. 1.

(*r*) *Tinney* v. *Tinney*, (1743) 3 Atk. 8.

(*s*) *Dyke* v. *Rendall*, (1852) 2 De Gex M. & G. 209.

(*t*) *Quære*, if this rule has been altered by the provisions of the Married Women's Property Act, 1882.

(*u*) Statute of Uses, (1535) s. 7. But it is doubtful if this provision could be enforced, in equity, as against a stranger. (See *Dyke* v. *Rendall*, *ubi sup.*) And, since the Dower Act, the matter is of little practical importance.

(*v*) *Lawrence* v. *Lawrence*, (1699) 2 Vern. 365.

Dower would also have been barred if the husband, on his original purchase, had taken the conveyance of the land in the form of *to uses to bar dower*, a complicated process designed to prevent a legal estate of inheritance vesting in the husband, while, at the same time, conferring upon him the beneficial interest in the property. Curiously enough, the Dower Act of 1833, which enabled the husband, as we have said, to bar his widow's claim to dower, not only by alienation of the property, but by mere declaration in his purchase-deed, has rendered the elaborate precautions of the *uses to bar dower* unavailing, by entitling the wife to claim dower out of equitable interests. But the complete control over dower conferred on the husband by that Act, has really rendered all such precautions needless, if not positively mischievous. The claims to dower which now arise are few in number; and occur generally in cases in which a man, either by oversight or sudden death, has failed to make due provision for his widow. They can in no way prejudice, as they formerly did, the interests of the purchasers or mortgagees who have taken from the husband; for all such alienations are absolute bars to claims of dower. Nor can they interfere with the intentions of the husband; for all such intentions, at least if properly expressed, also override the widow's claim. Finally, even a devise to the widow of any interest in land out of which she would have been entitled to dower, bars her claim to dower in all her husband's land, unless a contrary intention is declared by the will (*x*).

(*x*) Dower Act, 1833 (3 & 4 Will. IV. c. 105), s. 9.

CHAPTER V.

OF ESTATES LESS THAN FREEHOLD (OR CHATTELS REAL).

[OF estates that are less than freehold (commonly called *chattels real*), there are three sorts; 1. Estates for years: 2. Estates at will: and 3. Estates by sufferance.

I. An estate for *years* is a contract for the possession of lands or tenements, for some determinate period; and it happens where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon (*y*). And this amounts but to a chattel real, however long the period of time for which the lands are demised. For, in contemplation of law, no interest for a certain and determinate period of time,—even for 1,000 years,—is as large as an estate for life, which, as we have seen, is the lowest description of freehold (*z*).

Though the lease be but for half a year, or a quarter, or any less time, the lessee is respected as a tenant for years; and is so styled in some legal proceedings (*a*). And this may, not improperly, lead us into a short explanation of the division and calculation of time by the English law.

The space of a *year* is a determinate period, consisting of 365 days, the extra day in leap-years being, by the Calendar (New Style) Act, 1750 (*b*), accounted part of the preceding day, so that the two days make but one day in law. That of a *month* is more ambiguous. For a

(*y*) Litt. s. 58.
(*z*) Co. Litt. 46 a.
(*a*) Litt. s. 67.
(*b*) 24 Geo. II. c. 23.

[month is either a *lunar* month (consisting of twenty-eight days), or a *calendar* month, whereof in a year there are only twelve. And by the old common law, a month used to be, in matters temporal, a lunar month, unless otherwise expressed or implied (*c*). Therefore, a lease "for twelve months" is only for forty-eight weeks (*d*); but if it be for "a twelvemonth," in the singular number, it is good for the whole year (*e*).] But in all statutes passed after the year 1850, a "month" means a calendar month (*f*); and in the Orders and Rules of 1883 of the Supreme Court of Judicature, and generally in all judgments and orders made by the Court, the word has the same meaning (*g*).

[In the space of a *day*, all the twenty-four hours are usually reckoned (*h*); the law rejecting all fractions of a day, to avoid dispute. Therefore, if I am bound to pay money on any certain day, I discharge the obligation (as a general rule) if I pay the money any time before twelve o'clock at night (*i*). But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, or provisions, or other rent, to the lessors or landlords; but in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profit at a settled price, than as having any property of their own. And, therefore, they were not allowed to

(*c*) *Simpson* v. *Margitson*, (1847) 11 Q. B. 23; *Hutton* v. *Brown*, (1881) 45 L. T. 343.

(*d*) *Wilkinson* v. *Calvert*, (1878) 3 C. P. D. 360; *Barlow* v. *Teal*, (1885) 15 Q. B. D. 403.

(*e*) *Catesby's Case*, (1606) 6 Rep. 62 a.

(*f*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 3.

(*g*) Order LXIV. r. 1.

(*h*) Co. Litt. 135 a.

(*i*) By the Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9), this means, for Great Britain, Greenwich time.

[have a freehold estate; but their interest, such as it was, vested after their deaths in their executors, who were to make up the accounts of their testator with the lord and the other creditors, and who were entitled to the stock upon the farm.

While estates for years were thus precarious, it is no wonder that they were usually short; and indeed, we are told that, by the antient law, no leases for more than forty years were allowable, because any longer possession, especially when given without any livery declaring the nature and duration of the estate, might tend to defeat the inheritance (*k*). Yet this law, if it ever existed, was soon antiquated; for we may observe, in Madox's collection of antient instruments, some leases for years of a pretty early date, which considerably exceed that period. And long terms, for three hundred years, at least, were certainly in use in the time of Edward the Third, and probably of Edward the First (*l*). At all events, when by the stat. 21 Hen. VIII. c. 15, passed in the year 1529, the "termor," that is, the lessee, was protected against fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before, and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages.

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And, therefore, this estate is frequently called a term (*terminus*), because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and certain end (*m*). But, according to the maxim, *id certum est, quod certum reddi potest*, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years,

(*k*) *Mirrour*, bk. 2, ch. 27; Co. Litt. 45 b, 46 a.

(*l*) Stat. of Mortmain, (1279) 7 Edw. 1, st. 2.

(*m*) Co. Litt. 45 b.

[when J. S. hath named the years (*n*). If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease (*o*). A lease for so many years as J. S. shall live, is void from the beginning; for it is neither certain nor (during the continuance of the lease) can ever be reduced to a certainty (*p*). But a lease for twenty or more years, if J. S. shall so long live, is good; for there is a certain period fixed, beyond which it cannot last, though it may determine sooner, on the death of J. S. (*q*).

A lease for years, never having required livery of seisin for its creation, may be made to commence *in futuro*, though a lease for life may not. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life is void. And because no livery of seisin is necessary to a lease for years, such a lessee is not said to be *seised* of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in* the term, or *interesse termini*. But, when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him; and he is *possessed*, not properly of the land, but of the term of years (*r*).

Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers as a tenant for life; that is to say, house-bote, fire-bote, plough-bote, hay-bote (*s*), and the like.] The doctrine of *waste*, also, applies to tenants for years, even more stringently than to tenants for life.

(*n*) *Ibid.*

(*o*) Co. Litt. 46 b; *Doe* v. *Benjamin*, (1839) 9 A. & E. 644.

(*p*) Co. Litt. 45 b. (But this statement, presumably, only refers to the operation of such a disposition, regarded as a *lease for years*. A conveyance, properly executed, would, it is submitted, confer an estate *pur auter vie*.—E. J.)

(*q*) *Ibid.*

(*r*) *Ibid.* 46 b.

(*s*) Co. Litt. 41 b.

For as we have before remarked (*t*), the ordinary tenant for life is not responsible for permissive waste, or for merely suffering the premises to decay. But it seems now to be fairly settled (*u*), though the authority is somewhat indirect, that a tenant for years is, at least to some extent, liable for merely permissive waste. [And with regard to emblements, where the term depends upon a certainty, as if the tenant holds from Midsummer for ten years, and in the last year he sows a crop of corn, which is not ripe and cut before Midsummer, then, by the common law, the landlord shall have it. And this is because the tenant knew the date appointed for the expiration of his term, and therefore it was his own folly to sow that of which he never could reap the profits (*x*). But a custom to the effect that an outgoing tenant may return and reap the crop sown by him before the expiry of his term will be good, even though the tenancy was created by deed which did not mention the custom (*y*). And, where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in these and similar cases, the estate for years not being to expire certainly at a time foreknown, but merely by the act of God, the tenant for years, or his representatives, shall have the emblements in the same manner that a tenant for life, or his representatives, are entitled thereto. It is otherwise, however, if the estate determine by the act of the party himself, as if tenant for years does anything that amounts to a forfeiture; in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default (*z*)].

(*t*) *Ante*, p. 147.

(*u*) *Yellowly* v. *Gower*, (1855) 11 Exch. 274; *Davies* v. *Davies*, (1888) 38 Ch. D. 499.

(*x*) Litt. s. 68.

(*y*) *Wigglesworth* v. *Dallison*, (1799) 1 Doug. 190.

(*z*) Co. Litt. 55 b. (The rights of a tenant in respect of emblements have, as we have seen (*ante*, p. 149),

A tenancy "from year to year," or "by the year," may be created, in the first place, by the express agreement of the parties. And this agreement (provided the rent reserved be at the least two-thirds of the annual value of the land demised) may be either verbal or in writing; but, if the rent is under that amount, then it must be *by deed*. Secondly, such a tenancy may arise by construction of law; for the law will always imply a tenancy from year to year where there is an occupation at an annual rent, and there is no evidence that the occupier's estate is of a different description (*a*). And, formerly, if a man was let into possession under a demise not under seal, for a term of more than three years, though such a demise would not pass any legal interest in the premises for the term specified, yet the lessee was considered as holding from year to year, upon such of the terms of the agreement as were consistent with that tenancy (*b*). At the present day, however, such a demise (if good as an agreement to demise) confers an equitable interest in the land for the whole term, and not merely a legal interest from year to year (*c*).

It is to be observed, that where a tenancy "by the year" or "from year to year" is once created, it cannot, on either side, be put an end to without half a year's *notice to quit* from the one party to the other, such notice expiring with the current year of the tenancy (*d*); though if the tenancy commenced at one of the usual quarterly feast days, the half year must be computed from one of such feast days to another—as from Midsummer to Christmas—whether there be 183 days between them or not (*e*). It follows, therefore, that a lease "from year to

been greatly modified by the Landlord and Tenant Act, 1851.)

(*a*) *Ecclesiastical Commissioners* v. *Merral*, (1869) L. R. 4 Exch. 162.

(*b*) *Tress* v. *Savage*, (1854) 4 E. & Bl. 36, 42.

(*c*) *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9. (But such an agreement is not a "lease." *Swain* v. *Ayres*, (1888) 21 Q. B. D. 289.)

(*d*) *Morgan* v. *Davies*, (1878) 3 C. P. D. 260.

(*e*) *Ibid.*

year" will confer an estate for one year certain, determinable by half a year's notice expiring at the end of the first year (*f*). But if in that, or any succeeding year of the tenancy, more than half a year should elapse without a notice to quit being given by either of the parties, another year certain is thereby constantly added to that which is in progress (*g*). Also, and upon the same principle, if the lease be "*for a year*, and so from year to year," it will enure as a demise for *two years* certain, at the outset. For at the expiration of the first year there is a continuation of the tenancy, which cannot be determined by a notice to quit at an earlier period than the expiration of the second year (*h*). Moreover, this estate does not come to an end by an assignment of the interest of either of the parties, or by their death; but the tenancy will continue to exist between one of the parties and the assigns or representatives of the other, (or between the assigns or representatives of both parties, as the case may be,) until duly determined by the usual notice to quit (*i*). As regards leases which fall within the provisions of the Agricultural Holdings Act, 1883 (*k*), a *year's* notice, expiring with the current year of the tenancy, is now made necessary in lieu of the old half-year's notice, unless the parties agree in writing to the contrary. And when the tenancy is for a less period than a year, *e.g.*, from month to month, or from week to week, it may, in general, be determined by a month's notice (if it be a monthly letting), and by a week's notice (if it be a weekly letting) (*l*). It is to be observed, that a tenant from year to year, unlike a tenant for years, is not bound to repair,

(*f*) *Doe* d. *Plumer* v. *Mainby*, (1847) 10 Q. B. 473.

(*g*) *Cattley* v. *Arnold*, (1859) 1 J. & H. 660.

(*h*) *Legg* v. *Strudwick*, (1709) 2 Salk. 414; *Denn* v. *Cartwright*, (1803) 4 East, 31.

(*i*) *Cattley* v. *Arnold*, *ubi sup.*

(*k*) 46 & 47 Vict. c. 61, s. 33. But the benefit of this section cannot be claimed by, or on behalf of, an insolvent tenant.

(*l*) *Jones* v. *Mills*, (1861) 10 C. B. (N.S.) 800; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

and consequently will not be answerable for such permissive waste as may arise by his neglect to do so (*m*).

[II. The second species of estates not freehold, are estates at *will*. This is where lands and tenements are let by one man to another to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession (*n*).

Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other, for that the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine the will, and quit his connexion with the other, at his own pleasure (*o*). Yet this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out, yet the tenant shall have the emblements, with free ingress, egress, and regress to cut and carry away the profits (*p*). But it is otherwise where the tenant himself determines the will; for in that case the landlord shall have the profits of the land (*q*).

A tenant at will is liable for voluntary, but not for permissive waste (*r*).

A tenancy at will may be determined, not only by express notice of the intention to determine it, but also by any act on the part of the landlord which is inconsistent with the estate continuing (*s*), as, for example, by his entering upon the land and cutting timber, or carrying away stone (*t*), or taking a distress for rent and impounding it on the premises (*u*); or by any similar inconsistent act on the part of the tenant, as, for example, by his

(*m*) *Torriano* v. *Young*, (1833) 6 C. & P. 8.
(*n*) Litt. s. 68; Co. Litt. 55 a—57 b.
(*o*) Co. Litt. 55 a
(*p*) *Ibid.*
(*q*) *Ibid.* 55 b.
(*r*) Litt. s. 71.
(*s*) Co. Litt. 55 b.
(*t*) *Turner* v. *Doe* d. *Bennett*, (1842) 9 M. & W. 643.
(*u*) Co. Litt. 57 b.

[committing waste or assigning his estate (*x*). And if either the lessor or the lessee die or be outlawed, the estate is at an end (*y*).

The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears from the rule, that, in the event of the tenancy being determined by the act of the lessor, or his death, the lessee is entitled to emblements; and the lessee, after the determination of the lessor's will, has also the right of reasonable ingress and egress to fetch away his goods and utensils (*z*). If the rent be made payable quarterly or half-yearly, and the lessee determines the will, it is said that the lessor will in such a case be entitled to be paid the rent to the end of the current quarter or half-year (*a*). In fact, the courts lean against construing demises, where no certain term is mentioned, as tenancies at will (*b*); and rather hold them to be *tenancies from year to year, so long as both parties please.*] A lessor at will can distrain for rent, if the rent is a fixed amount (*c*).

[Among the examples of estates at will, there must, technically, be classed one that deserves a more special notice than any other. This is, the estate held by copy of court roll; or, as we usually call it, a *copyhold* estate.

The extent and nature of this estate is, as we previously explained, in treating of copyhold tenure, entirely determined by the custom of the manor of which it is held. A copyholder may, in many manors, be tenant in fee simple, in fee-tail, for life, by the curtesy, in dower or free bench, for years, at sufferance, or on condition. Yet none of those interests amount to freehold; for the

(*x*) *Ibid.* 57 a.

(*y*) *Oland's Case*, (1602) 5 Rep. 116 b; Co. Litt. 57 b, 62 b.

(*z*) Litt. ss. 68, 69.

(*a*) *Kighly* v. *Bulkly*, (1666) 1 Sid. 339; *Leighton* v. *Theed*, (1731) 2 Salk. 413. (But the doctrine is distinctly inconsistent with the passage in Co. Litt. 55 b, which is usually quoted in support of it.—E. J.)

(*b*) *Hamerton* v. *Stead*, (1824) 3 B. & C. 483.

(*c*) *Anderson* v. *Midland Ry. Co.* (1861) 30 L. J. Q. B. 94.

[freehold of the whole manor abides always in the lord only (*d*).] Therefore it is that, while many of the rules affecting freehold limitations (*e.g.* the *Rule in Shelley's Case* (*e*)) apply to copyhold estates, some others do not. Thus, the Statute *De Donis* is held not to affect copyhold interests; and, unless there is in the particular manor a *custom to entail*, a grant of a copyhold to "A. and the heirs of his body," will give A. an estate in fee simple conditional, which, on the birth of issue, will become a fee simple absolute (*f*). And so, while the estate of the copyholder is technically an estate at will, it is an estate at will *according to the custom of the manor*. And although, for many years after copyholders were recognized as *tenants*, they could not obtain protection of their estates against their lords in the king's courts (for they were, technically, their lords' villeins), that disability has long since disappeared; and now, for many centuries, copyholds have received from the courts as full a protection as any other estates. Still, however, there remain two curious marks of the original character of the copyholder's position. One of these is, the fact that no copyholder, however great his estate, may do any act in respect of his tenement in the nature of *waste*, upon pain of forfeiture of his interest (*g*); the other that, upon similar penalty, he may not (unless by his lord's licence) grant a lease for a longer period than one year, or aliene by any freehold assurance (*h*).

[III. An estate at *sufferance* is where one comes into possession of land under lawful title, but keeps it afterwards without any title at all (*i*). As if a man takes a lease for a year, and (after the year is expired) continues to hold the premises, without any fresh leave from the

(*d*) Litt. s. 81.

(*e*) *Baker* v. *Parson*, (1872) 42 L. J. Ch. 228.

(*f*) Co. Litt. 60 b.

(*g*) *Duke of Portland* v. *Hill*, (1866) L. R. 2 Eq. 765.

(*h*) *Jackman* v. *Hoddesdon*, (1594) Cro. Eliz. 351.

(*i*) *Anderson* v. *Midland Ry. Co.*, (1861) 30 L. J. Q. B. 94.

[owner of the estate. Or, if a man maketh a lease at will, and dieth, and the lessee continueth in the possession, he is tenant at sufferance (*k*). But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in entering and ousting the tenant, is ever imputed by the law; but the king's tenant, so holding over, is considered as an absolute intruder (*l*).

The estate (or tenancy) at sufferance will be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant; but, before entry, he cannot maintain an action of trespass against him, as he might against a stranger, because the original entry was lawful (*m*). And the reason is, because the tenant being once in by a lawful title, the law, (which presumes no wrong in any man,) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act, such as entry, will declare the continuance to be tortious, or, in common language, wrongful. But a tenant for life or years, who wilfully holds over after the determination of his term, and after written demand of possession, is liable to an action for double the value of the premises during the time that he retains possession (*n*).] And any tenant who gives notice of his intention to quit premises, and fails to quit in accordance with his notice, becomes thenceforward liable to pay double rent (*o*).

(*k*) Co. Litt. 57 b.

(*l*) *Ibid.*

(*m*) *Trevellian* v. *Andrew*, (1697) 5 Mod. 384.

(*n*) Landlord and Tenant Act 1730, s. 1.

(*o*) Distress for Rent Act, 1737 s. 18.

CHAPTER VI.

OF ESTATES UPON CONDITION.

[ESTATES *upon condition* have been reserved till now, because they are indeed more properly qualifications of estates, than a distinct species of themselves, seeing that any quantity of interest—a fee, a freehold, or a term of years—may depend upon condition.

A condition may be defined as some uncertain event, on the happening or not happening of which an estate may be either originally created, or enlarged, or, finally, defeated. And estates upon condition are either (1) estates upon condition implied, or (2) estates upon condition expressed (*p*).

1. Estates upon condition *implied* are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office generally, without adding other words; the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office. And, on breach of that implied condition, it is lawful for the grantor, or his heirs, to oust the grantee, and to grant the office to another person (*q*).

Upon the same principle proceeded all those forfeitures of estates which resulted from acts done by the tenant incompatible with his estate,—*e.g.*, if a tenant for life or for years enfeoffed a stranger in fee simple, that *by the common law* was a forfeiture of his estate, being a breach of the condition which the law annexed thereto, viz. that he should not attempt to create a greater estate

(*p*) Co. Litt. 201 a. (*q*) Litt. s. 378.

[than he himself was entitled to.] And a similar rule prevailed, by virtue of express statute (*r*), in the case of the commission of waste. But those forfeitures have been abolished by recent statute (*s*).

[2. Estates upon condition *expressed* are where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. And these conditions (commonly called conditions in *deed*) are either "precedent," that is, such as must happen or be performed before the estate can vest or be enlarged, or "subsequent," that is, such as by the failure or non-performance of which an estate already vested may be defeated. Thus, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this is a condition precedent, and the fee simple passeth not till the hundred marks be paid (*t*). But if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent, and it is provided, that, if rent be not paid at the times appointed in the reservation, it shall be lawful for the grantor and his heirs to re-enter and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not performed (*u*).

A distinction is, however, made between a condition in deed and a *limitation* (*x*), which Littleton denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is called

(*r*) Statute of Gloucester, (1278) c. 5.

(*s*) Real Property Limitation Act, 1833, s. 36; Real Property Act, 1845, s. 4.

(*t*) Co. Litt. 214 b.

(*u*) Litt. s. 325.

(*x*) Co. Litt. 234 b.

[a *conditional limitation*. Thus, when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l*. and the like, the estate determines as soon as the contingency happens, and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, an estate upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l*. by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,) the law permits the estate to endure beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition, and make an entry in order to avoid the estate (*y*)]. As to the necessity of entry, however, in such a case, there is a diversity (says Lord Coke) between a condition annexed to a freehold estate and a condition annexed to a lease for years. For, if a lease for years be made on condition that if the lessee goes not to Rome before such a day the lease shall be void, the lease is *ipso facto* void upon the breach of the condition, without any entry by the lessor; but if the lease is for life, an entry is necessary to defeat it (*z*).

The right of entry on breach of a condition subsequent cannot, probably, be reserved in favour of a stranger, but only in favour of the grantor and his heirs; and the effect of an entry by him or them, after breach, is to defeat altogether the estate which had before passed to the grantee, so that the grantor or his heirs are *in* again as of their former seisin (*a*). It was also a rule of the common law, that the right of entry on breach could not be *assigned* in any case to a stranger: so that, if a man had made a lease for life, reserving a rent,

(*y*) Co. Litt. 214 b.
(*z*) *Ibid.*
(*a*) *Ibid.*

with a proviso for re-entry in case of non-payment, and the lessor granted over his reversionary estate to another, the grantee could take no benefit from the condition (*b*). But, by a statute of the year 1540 (*c*), the law in this respect was altered, and the grantee of a reversion upon a lease for life or years now has, in respect of any breach subsequent to the grant to him, the same benefit from the condition of re-entry as the grantor himself would have had, in the event of the breach of any condition reserved for the benefit of the reversion. Moreover, by The Law of Property Amendment Act, 1859, where the reversion on a lease is *severed* (*i.e.*, split up between two or more individual purchasers, grantees of the reversion), and the rent is legally apportioned, each grantee of the reversion is, *quoad* such portion of the demised lands as is included in his purchase, entitled to the full benefit of the condition or right of re-entry created by the original lease, for non-payment of the rent apportioned to the lands included in his purchase. The Conveyancing Act, 1881, has, in respect of leases created after the 31st of December, 1881, extended this right to the enforcement of all covenants and conditions reserved for the benefit of the reversion.

[These express conditions are void, if they be *impossible* at the time of their creation, or afterwards by the act of God or the act or default of the grantor, become impossible; and also if they *be contrary to law*, or *repugnant* to the nature of the estate granted. In any of which cases, if they be conditions *subsequent*, the estate shall be absolute at once, and the condition subsequent discharged. Thus, if a feoffment be made to a man in fee simple, on condition to be void, unless he goes to Rome in an hour, or marries with Jane S. by such a day (within which time the feoffor marries her himself), or unless he kills another, or in case he alienes in fee; in all these cases,

(*b*) Co. Litt. 215 a. (*c*) 32 Hen. VIII. c. 34.

[the condition is void, and the estate is at once made absolute in the feoffee (*d*). But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that if he kills another or goes to Rome in an hour, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant. For he hath no estate until the condition be performed (*e*).]

The operation of a condition reserved in any lease may be suspended, either by an express licence from the person entitled to the benefit of it, or by a mere waiver, that is, by a deliberate omission to take advantage of a breach which has already occurred (*f*). Formerly the rule of law was, that a licence to commit a single breach, or the waiver of a right to enter upon such a breach, destroyed the whole condition. But now, by the operation of The Law of Property Amendment Act, 1859 (*g*), the effect of a licence is confined to the particular breach to which it is directed; and a similar effect is given to a waiver by The Law of Property Amendment Act, 1860 (*h*). With regard to relief against forfeitures actually incurred, something will be said hereafter (*i*).

There are some estates upon condition subsequent that require a more particular notice, namely, *mortgage* estates, and estates by *elegit*. And, first, as to mortgage estates.

The modern form of mortgage is an absolute conveyance by the borrower (the mortgagor) to the lender (the mortgagee) of his (the mortgagor's) interest in the land, accompanied by a proviso that, upon repayment of the mortgage-money and interest, the mortgagee will

(*d*) Litt. s. 360; Co. Litt. 206 a; *Rosher* v. *Rosher*, (1884) 26 Ch. D. 801.

(*e*) Co. Litt. 206 b; *Shrewsbury* v. *Scott*, (1859) 6 C. B. (N.S.) 179.

(*f*) Co. Litt. 211 b.

(*g*) Ss. 1, 2.

(*h*) S. 6.

(*i*) *Post*, bk. ii., pt. i., ch. xxiv.

reconvey the property. Thus, as will be seen, it does not, strictly, create an estate upon condition. But, inasmuch as equity has long considered the property, in such a case, as held by the mortgagee simply as security for the repayment of money, the position is (with certain important exceptions) much the same as that created by the older form of mortgage by feoffment upon condition subsequent.

So soon as the estate in mortgage is created, the mortgagee may (in the absence of any stipulation to the contrary) enter on the lands, being, however, bound to restore them upon payment of the mortgage money. And, therefore, it is usual to insert in the mortgage deed a proviso, that the mortgagor shall hold the land till default on the day assigned for payment, on which default happening, the mortgagee is entitled to enter and take possession. Nor did the principles of the common law admit of his being afterwards evicted by the mortgagor (*k*). On this entry by the mortgagee, if there is a tenant in occupation, under a lease *prior* to the mortgage, his occupation cannot of course be disturbed; but he must pay over his rents to the mortgagee. But if there be a tenant in possession under a lease granted by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee, he may be ejected without notice; unless indeed such subsequent lease was made under and in conformity with the Conveyancing Act, 1881 (*l*), which, for the first time, made the leases of the mortgagor valid against the mortgagee.

But though a mortgage be thus forfeited on such default, and the estate thereupon absolutely vested at law in the mortgagee, yet in equity the mortgagor will be allowed to recall, *i.e.*, *redeem*, his estate, on paying to the mortgagee his principal, interest, and expenses. For

(*k*) *Doe* v. *Maisey*, (1828) 8 B. & C. 767.

(*l*) S. 18. (It should be noticed, however, that the provisions of this section may be excluded by agreement of the parties.)

otherwise, an estate worth 1,000*l.* might, in strictness of law, be forfeited for non-payment of 100*l.* or a less sum. Six months' notice must, in general, be given of the mortgagor's intention to redeem, or six months' interest must, in general, be paid in lieu of giving such notice (*m*).

The estate of the mortgagor, after default, is, therefore, called his *equity of redemption;* and, while his equity of redemption continues, the *mortgagor* is regarded in equity as the owner of the estate, subject only to the mortgage debt (*n*). So strictly was this view held that, until recently, the person to whom the estate descended or was devised by the mortgagor was entitled to have the debt paid out of the mortgagor's general personal estate. But now, by the Real Estate Charges Acts of 1854, 1867, and 1877, this rule has been abolished; and, on the death of the mortgagor, the mortgaged estate comes to his devisee (or heir) encumbered with the debt.

Conversely, the interest of the mortgagee is regarded in equity, not as an estate in land, but as a security for the payment of money. On *his* death, therefore, it ranks as personalty, and is available for the payment of legacies, or, in the event of intestacy, is distributed for the benefit of his next-of-kin. And it would seem that, even where there is a specific devise of the mortgaged property, the benefit of the mortgage money will not necessarily pass under it (*o*).

The mortgagor desiring to discharge the mortgage debt may take proceedings "to redeem" in the Chancery Division; and, if the mortgagee be not in possession, this proceeding merely calls upon the mortgagee to reconvey, on payment of principal, interest, and costs. But, if the mortgagee has obtained possession, it asks that an account

(*m*) *Smith* v. *Smith*, [1891] 3 Ch. 550.

(*n*) *Casborne* v. *Scarfe*, (1737) 1 Atk. 603 (2 White & Tudor, 6).

(*o*) *In re Clowes*, [1893] 1 Ch. 214; but see *In re Carter*, [1900] 1 Ch. 801.

may be taken of all the rents and profits on the one hand, and of the principal, interest, and costs on the other, and a balance struck between them; and that, on payment of what may appear due to the mortgagee on such account, a reconveyance may be made, and the possession of the premises restored. If the original mortgagee be dead, the proper persons to reconvey, even in the case of a mortgagee in fee, are the personal representatives of the mortgagee. This rule was introduced (to avoid the difficulty of getting the heirs to concur in a reconveyance which brought them no benefit) by the Vendor and Purchaser Act, 1874; and it has been confirmed and extended by the Conveyancing Act, 1881 (*p*), and the Land Transfer Act, 1897 (*q*). It does not, however, apply to mortgages of copyholds, when the mortgagee has been admitted as tenant of the lord (*r*).

On his part also, the mortgagee, where his debt remains unpaid after the time agreed on, may take proceedings "for foreclosure," calling upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same, that is, to lose his equity of redemption without possibility of recall. In such proceedings, however, as well as in any action for redemption, the Court may, if it thinks fit, on the application of any person interested, direct a sale of the property (*s*). The mortgagee may, instead of bringing a foreclosure action, sell the estate in satisfaction of his debt, (paying over the surplus proceeds, if any, to the mortgagor,) even without resorting to proceedings in equity, and without any concurrence on the part of the mortgagor. Formerly the power of sale was expressly conferred by the mortgage itself; but now, in the case of mortgages by deed, the mortgagee has in every case, and independently of express provision, a statutory power of sale. This was conferred by the Conveyancing

(*p*) S. 30.
(*q*) S. 1.
(*r*) Copyhold Act, 1894, s. 88.
(*s*) Conveyancing Act, 1881, s. 25.

Act, 1881 (ss. 19—21), which Act confers also other powers on mortgagees, such as, to insure, and to appoint a *receiver* who shall receive the rents and profits as agent of the mortgagor (*t*).

By an important provision of the Judicature Act, 1873 (*u*), a mortgagor entitled for the time being to the possession of land, as to which no notice of his intention to take possession thereof has been given by the mortgagee, may, in general, sue for such possession, or for the recovery of the rents or profits, or to prevent (or recover damages in respect of) any trespass or other wrong relative thereto, in his own name only, and without adding the mortgagee as a co-plaintiff with himself.

[Second, as to estates by *elegit*. *Elegit* is the name of a writ, founded on the statute of Westminster the Second (*x*), by which, after judgment in an action has been obtained, the sheriff gives the judgment creditor possession of the lands and tenements of the defendant, to be occupied and enjoyed by the plaintiff (as judgment creditor) until the money due on the judgment is fully paid; and, during the time the judgment creditor so holds the lands, he is called *tenant by elegit*, his estate being a mere conditional estate, defeasible as soon as the judgment debt is levied.] Of the proceedings under a writ of elegit, more will, hereafter, be said. Here it is sufficient to note that the tenant by *elegit*, though holding *ut liberum tenementum* by the old law, was never deemed to have more than a chattel interest in the land.

(*t*) 44 & 45 Vict. c. 41, ss. 19—24. (See *post*, bk. ii., pt. i., ch. xxiv.)

(*u*) 36 & 37 Vict. c. 66, s. 25 (5).

(*x*) 13 Ed. 1, (1285) c. 18.

CHAPTER VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

[HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners may have therein. We are now to consider them with regard to the *time of their enjoyment*, as being either estates in *possession* or estates in *expectancy*. Where a man is entitled immediately to the pernancy or taking of the profits, his estate is said to be in possession ; and when entitled to it, not immediately, but at some future time, his estate is said to be in expectancy. And of such expectancies, there are, at the common law, two sorts, the one a *reversion*, and the other a *remainder*.

I. Of estates in *possession* not much remains to be said. But it is material to remark, that a man may have an estate in possession in land, and may yet not be in actual possession of the land. For it has long been the settled rule of law, that a freehold interest which is merely subject to a term of years, is an interest in possession ; and the owner of such freehold interest, if actually in receipt of the profits of the term, is properly described as being *seised in his demesne as of fee* (or *freehold*) (*y*). The origin of this rule was, undoubtedly, the doctrine of the common law, that the occupation of the lessee for years was not *seisin*, but a minor kind of possession, the existence of which was not inconsistent with the seisin of the lessor. And although, by changes in the law, this distinction has become of less importance, yet the old rule survives for some purposes, *e.g.*, to enable a widow

(*y*) See Challis, *Real Property* (2nd ed.), p. 89.

[to claim dower out of her husband's reversion on a term of years, which she cannot do out of a true reversion (*z*).

II. An estate in *reversion* is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived. And the derivative estate is called the *particular estate* (as being only a part or *particula* of the original one), and the ulterior interest is called the *reversion* (*a*). Thus, when the owner of the fee simple creates an estate in tail, or an estate for life or for years, the residue of the fee simple which is undisposed of is the reversion expectant upon the particular estate in tail, for life, or for years, so created; and it continues vested in him who was before the owner of the whole, without any special reservation for the purpose (*b*). For, where a smaller estate is merely taken out of a larger, the residue remains, of course, in the original proprietor; and such reversion is an actual estate. But if the "particular" estate is an estate of freehold, the reversion is an estate in expectancy only; because the reversioner, after creating the particular estate, has no right to the possession until the particular estate is determined.

The tenant of a particular estate in tail, for life, or for years, holds of the reversioner, by fealty and by such services as are reserved between them; and the usual *incidents* to reversions are therefore said to be fealty and rent. The fealty is an inseparable incident of the reversion; but the rent, when rent also is reserved, although incident to, is not inseparably incident to, the reversion. For the rent may be granted away, reserving the reversion; and, by special words, the reversion may

(*z*) Co. Litt. 29 b, 32 a.

(*a*) Lord Coke says, "A reversion "is where the residue of the estate 'always doth continue in him that "made the particular estate, or "where the particular estate is "derived out of his estate." (Co. Litt. 22 b.)

(*b*) Litt. s. 19.

[be granted away, reserving the rent. But, by a *general* grant of the reversion, the rent will pass with it as incident thereto, though by the grant of the rent generally, the reversion will not pass (*c*).]

Where a freehold reversion (that is, a reversion in fee, in tail, or for life) is expectant on a particular estate of freehold, the reversioner is said to be "seised of the reversion *as of fee*" (or, if his estate be for life, "*as of freehold*"), and not to be "seised of the land *in his demesne* as of fee" (or, "as of freehold"), as in the case of an estate in possession.

By the principles of the *common law*, if the owner of a reversion attempted to turn it into a remainder by a limitation to himself, his attempt was merely inoperative. This rule was especially important in questions of inheritance; for it often determined the line of succession. Thus, if A., seised in fee of an estate which had descended to him from his mother, made a conveyance to a stranger for life, with remainder to himself, his interest remained, nevertheless, a reversion, and descended on his death intestate only to his heirs of the mother's blood. And this was also the rule, though the conveyance were made *to the use* of himself and his heirs (*d*). But now, by the Inheritance Act, 1833 (*e*), such a person will be deemed to have acquired his interest as a "purchaser"; and it will, accordingly, be capable of descending to his heirs general.

[III. An estate in remainder may be defined to be, an estate limited to take effect and be enjoyed after the natural expiry of another estate *limited by the same conveyance* (*f*). Thus, if a man seised in fee simple granteth lands to A. for life, and, after the determination

(*c*) Co. Litt. 151 b, 152 a.

(*d*) *Godbold* v. *Freestone*, (1694) 3 Levinz, 406.

(*e*) S. 3.

(*f*) Lord Coke defines a remainder as "a remnant of an estate in lands "or tenements, expectant upon a "particular estate created together "with the same at one time." (Co. Litt. 143 a.)

[of the said estate, to B. in fee, here B.'s estate is said to be a *remainder*. And the same will be the case, however many successive estates are created, provided only that there be no attempt to limit any further interest after a fee simple. Thus, a conveyance to A. for life, and after his death to B. for life, and, after B.'s death, to C. in tail, and, after the expiry of that estate to D. in fee, will create three successive remainders. But any attempt to create an interest to take effect subsequently to, or even on failure of, D.'s estate, will be void *as a remainder*, though it may be good as an executory limitation (*g*).

From what has been premised, it appears that a reversion and a remainder are both estates in expectancy, but differ in this respect, that the former remains in the grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder that a man could, by the old *common law*, create a new freehold estate in expectancy, in a corporeal hereditament. For, by that law, a freehold in hereditaments corporeal could not be created to commence *in futuro* (*h*), that is, without the interposition of a particular estate on which it should depend and be expectant. Thus, if A., seised in fee of lands, convey them to B. to hold to him and his heirs, after the end of the three years next ensuing, that conveyance is, by the common law, merely void. And the reason is, that no freehold could be created or transferred at common law, in a corporeal hereditament, without livery of seisin (*i*), a ceremony which is in its nature incompatible with any grant of the freehold *in futuro*. For livery imports a change of possession, and consequently supposes that the immediate possession, and not merely a future estate, is conveyed by the feoffor.

(*g*) *Gardner* v. *Sheldon*, (1669) Vaugh. 269.

(*h*) *Barwick's Case*, (1597) 5 Rep. 94 b.

(*i*) Co. Litt. 217 a.

[And as it was the necessity for this livery which constituted the reason of the rule, so the rule itself extended not to mere chattel interests (*k*), for these were capable (even at common law) of being made to commence *in futuro ; e.g.*, a lease for seven years from next Michaelmas would be good. But when a particular estate is created, a freehold *remainder* can be readily limited thereon ; for the livery of seisin is made to the particular tenant, and (when so made) enures also to the remainder-man, the particular estate being said to "support" the remainder. Thus, a man may convey to A. in tail, remainder to B. in fee, and the same livery which conveys the estate tail to A. will also pass the remainder expectant thereon to B., the whole estate passing at once from the grantor to the grantees, and the remainder-man becoming seised of his remainder, at the same time that the particular tenant is seised of his estate tail (*l*).

With respect to the creation of all remainders, the following are the rules to be observed :—

1. *There must be some particular estate precedent to the estate in remainder* (*m*). For *remainder* is a relative expression, and implies that some part of the thing is previously disposed of. But a lease at will is not held to be such a particular estate as will support a remainder (*n*) ; for an estate at will is of a nature so slender and precarious that it is not to be looked upon as a portion of the inheritance at all.] And, although the books frequently speak of a freehold remainder upon a term of years, this is an incorrect expression, because, as we have seen, a freehold interest which is subject to a term of years is not really a remainder, but an estate in possession. Thus, according to Littleton and Coke, a lease to A. for five years, with remainder to B. for life, is a good limitation ; but only if livery of seisin is delivered

(*k*) *Barwick's Case, ubi sup.*
(*l*) Co. Litt. 143 a.
(*m*) Fearne, by Butler, p. 390, 9th edit.
(*n*) *Lord Stafford's Case,* (160 8 Rep. 75 a.

to A. for the benefit of B., whereby B. obtains, not a remainder, but a present estate, as Littleton himself tells us (*o*).

[2. *A remainder must commence or pass out of the grantor, at the time of the creation of the particular estate* (*p*). Therefore, where it is proposed to give A. an estate for life, with remainder to B. in fee, B.'s remainder in fee passes from the grantor, at the same time with A.'s life estate in possession. For if the estate, ulterior to that for life, continues in the grantor, it is a reversion, and no remainder; and B. can take only by subsequent grant of that reversion.

3. *A remainder must be limited to vest in the grantee during the continuance of the particular estate, or* eo instanti *that it determines* (*q*). When the grantee is an ascertained person, this results naturally from the operation of the last preceding rule; and the remainder is, in such a case, said to be *vested* from its creation. For if the future estate is to take effect in possession at any period *later* than the determination of the first,—as if an estate be granted to A. during his life, and upon his death and one day after to B. and his heirs,—this is no remainder. But also the future estate will be no remainder, if it is not to *await* the proper and regular determination of the first; as where an estate is limited to A. for life, but if B. pays him a certain sum of money, then immediately to B. and his heirs. Here the estate of B. is no remainder, but is an estate which takes effect (if it ever do take effect) in defeasance of the prior particular estate to A. But, though a remainder cannot be limited to take effect in possession until the particular estate regularly determines, yet eventually it may do so before that period. For if the particular estate determine by act of law (as by forfeiture) before its natural expiration,

(*o*) Litt. s. 60.
(*p*) *Ibid.* s. 721.
(*q*) *Chudleigh's Case*, (1589) 1 Rep. 135 a; *Boraston's Case*, (1587) 3 Rep. 21 a.

[the remainder limited upon it will come into immediate possession, and is not required to wait until the expiration of the period originally assigned.

But there is a very important class of remainders, called *contingent*, in which the estate in remainder, though it passes out of the grantor at the time of the conveyance, cannot vest at once in the remainder-man, either because it is limited to an unascertained person, or to a person who is only to take it on the occurrence of an event which may never take place, or which may not take place before the determination of the particular estate. The first kind, or those limited to an uncertain person, may be exemplified by a limitation to A. for life, remainder to B.'s eldest son, then unborn, in tail; or to A. and B. for their joint lives, remainder to the survivor in fee: for here the survivor is not ascertained. The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life, and, in case B. survives him, then to B. in fee; here the remainder to B. is *contingent*, for A.'s dying before B. is an event that may never happen. On the other hand, if there be no uncertainty either in the person or in the event, the mere uncertainty whether the remainder will ever take effect in *possession*, is not sufficient to give it the character of a contingent remainder. Therefore, in the case of a lease to A. for life, remainder to B. for life, the limitation of the remainder to B. is to a person in being, and ascertained, and the event on which it is limited is certain, viz. the determination of A.'s life estate; therefore it is a vested, and not a contingent remainder, though it may possibly never take effect in possession, because B. may die before A. So, also, an estate limited to an existing and ascertained person (B.) upon the determination of an estate tail, is a vested and not a contingent remainder; for it is considered in law, that the estate tail, being a particular estate, is sure to come to an end, and that the failure of issue is consequently not a contingency, but a

[certain event. The case falls, therefore, within the definition of a vested remainder, the estate limited to B. being one that is invariably fixed to remain to a determinate person after the particular estate is spent.]

No remainder, as we have already pointed out, can be limited after a fee simple; a contingent remainder may, however, be limited in *substitution* for another contingent remainder in fee simple. As if land be given to A. for life, and if he have a son, then to that son in fee; and if he have no son, then to B. in fee (*r*). This has been sometimes called *a contingency with a double aspect* (*s*); and such remainders as these are *concurrent* and not *consecutive*, both being remainders on the particular estate, and not remainders on each other (*t*).

With reference to the nature of the contingency on which a remainder may be limited, it is laid down by many of the older writers that it must be a *common*, and not a *remote* or *double* possibility; or, as it is sometimes put, *there cannot be a possibility upon a possibility*. The vagueness of this alleged rule has often been a source of perplexity, both to students and practitioners. It seems well, therefore, to point out that, so far as its practical results are concerned, these are confined to the recognition of two canons regarding the limitation of contingent remainders. These canons are:—1. *That there cannot be a limitation to an unborn person for life, followed*

(*r*) *Doe* v. *Scudamore*, (1800) 2 Bos. & P. 289; *White's and Hindle's Contract*, (1877) 7 Ch. D. 201.

(*s*) *Loddington* v. *Kime*, (1697) 1 Lord Raym. 203.

(*t*) Inasmuch as a contingent remainder in fee is a disposition (subject to the particular estate) of the *whole* inheritance, a question has been raised as to what becomes of the inheritance in the meantime. According to the older authorities, it is in *abeyance*, or (according to Lord Coke) *in nubibus*. (Co. Litt. 342 b.) But according to Mr. Fearne, it continues in the grantor (Fearne, 363). And certainly, where the contingent remainder in fee is created by a conveyance operating under the Statute of Uses (as to which hereafter), the fee remains in the grantor till the contingency happens; and where it is created by a will, the fee descends in the meantime to the heir-at-law.

by a valid limitation to any issue of that unborn person. If such limitations occur in a *deed*, the second is merely null (*u*). If they are found in a will, then, if the second limitation is a limitation in tail (but not otherwise) the person to whom the first estate is given will take an estate tail, provided that such a limitation would, if not barred, carry the estate by descent to the issue specified in the second limitation (*x*). Thus, if land be devised to the eldest (unborn) son of A. for life, with remainder to his eldest son in tail, the effect of this rule will be to vest in A.'s eldest son, on his birth, an estate tail, which, on attaining the age of twenty-one, he will be able to convert into a fee simple. This peculiar rule (known as the "*cy près* doctrine") gives us a hint as to the origin of the old canon under discussion; which can hardly have been other than the desire of the Courts to prevent the creation of an unbarrable estate tail.

2. The second canon resulting from the rule against double possibilities is the maxim, *that a remainder cannot be well limited to a corporation not* in esse, *nor to the* heirs, *as purchasers, of an unborn person* (*y*). Of course, such a limitation, if valid at all, must operate to confer a future estate; for no one not in existence can take a present interest. But it has long been the rule of law that, as a remainder, it is entirely void, whilst, as an attempt to create an executory interest, it would necessarily (in almost all cases) infringe the Rule against Perpetuities, hereafter to be explained. It must be remembered, however, in connection with this canon, that it only applies where the heirs take *as purchasers*; and not where, according to the rule in *Shelley's Case* (hereafter to be explained) they are merely named to indicate the amount of the estate acquired by a previous taker.

(*u*) *Whitby* v. *Mitchell*, (1890) 44 Ch. D. 85.

(*x*) *Monypenny* v. *Dering*, (1852) 2 Dr. & W. 145; *Forsbrook* v. *Forsbrook*, (1867) L. R. 3 Ch. App. 93.

(*y*) *Cholmley's Case*, (1597) 2 Rep. 51.

[Contingent remainders are also subject to the following general rules:—

3. *If they amount to a freehold, they cannot be limited on an estate for years, or on any particular estate less than a freehold estate.* Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; but if granted to A. for life with a like remainder, it is good (*z*). For, unless the freehold passes out of the grantor at the time when the contingent freehold remainder is created, such remainder is void (*a*); and the freehold cannot pass out of the grantor without vesting somewhere. But, in the case of a contingent remainder, it must either vest in the particular tenant, or it vests nowhere; unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

4. *Every contingent remainder must become vested either during the continuance of the particular estate, or* eo instanti *that it determines.* When the contingent person comes into being or is ascertained during the continuance of the particular estate, or the contingent event takes place during that period, the remainder ceases to be contingent, and becomes a vested remainder. Thus, if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail, the instant that a son is born to B. during the continuance of the particular estate, the remainder is no longer contingent, but vested (*b*). On the other hand, although the person comes not into being, or is not ascertained, or the event does not happen during the continuance of the particular estate, yet, if such person or event comes into being, or is ascertained, or happens, *at the instant* at which the particular estate determines, the remainder then takes effect as an estate in possession.]

(*z*) *Chudleigh's Case*, (1589) 1 Rep. 130 a.

(*a*) See *ante*, p. 185.

(*b*) *Archer's Case*, (1598) 1 Rep. 66 b; Co. Litt. 298 (a).

Thus, if land be given to A. and B. during their joint lives, remainder to the survivor in fee, this remainder, immediately on the death of either, becomes vested in possession in the survivor. It followed from this rule, that so long as a remainder was in contingency, it always required the *continuing* support of the particular freehold estate (*c*). So that, if that estate by any means came to an end before the contingency happened, the remainder was altogether *defeated* (*d*). For before the happening of the contingency, there was no person in whom the remainder could vest, and (by the rule under consideration) it could no longer exist as a contingent remainder, because the particular estate was determined. For example, if A. were tenant for life, with remainder to B.'s eldest son, then unborn, in tail, and A. died before the contingency happened, that is, before B. had a son, the remainder was absolutely gone; for the particular estate was determined before the remainder could vest (*e*). So strict was this rule, that, in one case, where A., tenant for life under a will, with remainder to his own eldest son in tail, died without issue born, but leaving his wife *enceinte*, and after his death a posthumous son was born; it was held, that this son could not take the land by virtue of the remainder, the particular estate having determined before there was any person actually in existence in whom the remainder could vest. But this decision was reversed in the House of Lords; and the law on this subject has now been declared by a statute of the year 1698, which enacts that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime (*f*).

(*c*) *Archer's Case, ubi sup.*

(*d*) *Purefoy* v. *Rogers*, (1671) 2 Saund. 386, 387.

(*e*) *Reeve* v. *Long*, (1694) 1 Salk. 228.

(*f*) 10 & 11 Will. 3, c. 16. (The language of the statute is by no means so wide as the construction usually put upon it.)

[A contingent remainder was also formerly defeated, not only by the natural determination or expiration of the particular estate on which it depended, but even by the premature determination of that estate, *e.g.*, when the estate was determined prematurely by the voluntary act of the particular tenant himself (*g*). So that a tenant for life, with remainder to his unborn son in tail, remainder over to a stranger in fee, might, before a son was born, by destroying his life estate (*e.g.*, by a surrender of his life estate to the ultimate fee simple remainder-man) have defeated the contingent remainder to his son (*h*). It was, therefore, necessary in such a case to have trustees appointed *to preserve the contingent remainders*, that is to say, persons interposed between the tenant for life and the contingent remainder-man, and in whom there was vested an estate for the *natural* life of the tenant for life. And then, if the estate for life determined otherwise than by death,—for example, by the tenant for life's wrongful alienation or surrender, —the estate of the trustees took effect during the residue of the natural life of the tenant for life, and that estate in the trustees was sufficient to support the remainder, or successive remainders, depending in contingency. This method is said to have been invented by Sir Orlando Bridgman and his contemporaries during the Civil War.]

But the liability of contingent remainders to destruction has now been materially altered. For, by the Real Property Act, 1845, s. 8, it has been protected against the *premature* determination of the prior particular estate, that statute enacting, that "a contingent remainder "existing at any time after the 31st day of December, "1844, shall be,—and if created before the passing of "that Act, shall be deemed to have been,—capable of "taking effect, notwithstanding the determination by "*forfeiture, surrender*, or *merger*, of any preceding estate

(*g*) *Archer's Case*, (1598), 1 Rep. 66 b.

(*h*) *Purefoy* v. *Rogers*, (1671) 2 Saund. 386, 387.

"of freehold, in the same manner, in all respects, as "if such determination had not happened." And by the Contingent Remainders Act, 1877, it has been protected (to some extent) even against the *natural* expiration of the prior particular estate, that statute enacting, that every contingent remainder created by any instrument (including a will) executed after the 2nd August, 1877, *which would have been valid as an executory limitation*, shall (in the event of the prior particular estate determining before the contingent remainder vests) be capable of taking effect in all respects as if it had originally been created as an executory limitation. Of the nature of executory limitations, we shall hereafter speak (*i*).

Closely connected with the subject of remainders, and with one another, are two highly technical rules of English Law, viz., the *Rule in Shelley's Case*, and the more general doctrine of *Merger*. The *Rule in Shelley's Case*, as propounded in Lord Coke's Reports, is in the following form:—That when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited (either mediately or immediately) to his *heirs* in fee or in tail, the word *heirs* is always, in such cases, a word of *limitation*, and not of *purchase* (*k*). That is to say, the word "heirs" is to be understood as expressing the quantity of estate which the ancestor is to take, and not as conferring any distinct estate on the persons who may become his heirs. And here let it be observed, that this is the *ordinary* force of the word "heirs." For if land is given to a man and his heirs, the man takes a fee simple; and the word "heirs" plainly operates as a mere limitation of the quantity of his estate. So also, where land is given to A. for his life, and on his decease to his heirs, or to the heirs of his body. In such a case, and by the effect of the *Rule in Shelley's*

(*i*) See *post*, bk. ii. pt. i. ch. ix.

(*k*) *Shelley's Case*, (1581) 1 Rep. 104 a.

Case, the heirs, or heirs of the body, of A. will not take in remainder, nor will A. himself take a mere life estate; but A. will take a remainder also, in fee or in tail. And, as that remainder will absorb (and merge) his life interest, the result upon the whole conveyance will be to give A. an *estate in fee* (or in *tail*, as the case may be) *in possession*. Even if another particular estate (for example, a life estate to B.), be interposed between the life estate of A. and the ulterior limitation to A.'s heirs (or to the heirs of A.'s body), that ulterior limitation will take effect in A. himself, but as a vested remainder only, because of the intervening estate in B. which will prevent the merger. And here, note, that if the estate interposed be a contingent remainder, A. will take the entire fee; for while the contingency is in suspense, there is nothing to prevent the consolidation of his life estate with his ulterior fee simple estate. Yet A. (in such a case) takes the entire fee *sub modo* only; that is to say, it will open and let in the intermediate estate, if and when the contingency happens (*l*).

With regard to the origin and reason of the *Rule in Shelley's Case*, opinion is somewhat divided. But the reasonable view appears to be, that it was introduced in the interests of the Crown and the feudal magnates, who, if it had been possible to split up every fee into two successive estates, the one in possession, held by a tenant for life, and the other in remainder, claimed as a purchaser by the expectant heir, would have been deprived of those numerous and profitable perquisites of forfeiture, escheat, wardship, marriage, and the like, which, for the most part, only accrued upon the descent of an estate in fee. However this may be, it is very material for the student to observe—(1) That the rule is now so firmly fixed in our law, that not even an expressed intention on the part of the settlor will prevent it applying; (2) That

(*l*) *Lewis Bowles's Case*, (1616) 11 Rep. 80.

it holds where both the limitations are equitable, as well as where they are both legal. In other words, the rule is not a rule of construction, but a rule of law; and it applies to equitable, as well as to legal interests (*m*).

The second of the two rules which we are now discussing is the doctrine of *Merger*, which is of far wider scope than the *Rule in Shelley's Case*, and is equally applicable to remainders and reversions. For it is a general principle of law, that where a greater estate and a less estate of the same kind coincide in one and the same person, without any intermediate estate (*n*), the less estate is immediately annihilated or *merged*, that is sunk or drowned, in the greater. [Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But in order to this merger of estates, the estates must come to one and the same person, *in one and the same right;* for if the freehold be in his own right, and he has the term in right of another (*en auter droit*), there is no merger. Thus, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; because he hath the fee in his own right, and the term of years in the right of the testator, subject to his debts and legacies. So, also, if he who hath the remainder in fee marries the tenant for life, there was no merger, even before the recent Married Women's Property Act; for he had the inheritance in his own right, and the lease in the right of his wife (*o*). Moreover, an estate tail is an exception to the general law of merger. For a man may have, in his own right, both an estate tail and a remainder

(*m*) The rule has lately been discussed, with great learning and ingenuity, by Lord Macnaghten, in the case of *Van Grutten* v. *Foxwell*, [1897] A. C. 658.

(*n*) *Duncomb* v. *Duncomb*, (1695) 3 Lev. 437. [It is very doubtful whether this decision is consistent with the *Rule in Shelley's Case*.—E. J.]

(*o*) *Jones* v. *Davies*, (1860) 5 H. & N. 766.

[in fee. And the estate tail, though a less estate, shall not merge in the fee (*p*); because estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De Donis*.]

Merger is not confined to cases where one of the coinciding estates is higher in *quality* or is greater in *quantity* than the other; for it seems to be the better opinion that a term of years will merge in the immediate reversion, though that be a chattel interest also. And though the reversion is of shorter duration than the term on which it is expectant, yet the latter will merge (*q*). Also, a fee simple conditional will merge in the possibility of reverter (*r*).

By a useful provision of the Real Property Act, 1845, where the immediate reversion on a lease for years is merged in the next ulterior estate, that ulterior estate becomes (for all the purposes of the lease) the immediate reversion on the lease.

But the Judicature Act, 1873, has dealt a severe blow at the doctrine, by providing that there shall be no merger, *by operation of law only*, of any estate the beneficial interest in which would not be deemed to be merged in equity. And, as it was the rule of equity to deny a merger in all cases where any beneficial right or interest would be unjustly affected thereby, recent decisions have tended to restrict very severely the operation of the principle (*s*).

In order to assist such persons as have any estate in remainder, reversion, or other expectancy after the death of others, it is provided by the *Cestui que Vie Act*, 1707, that all persons on whose lives any lands or tenements

(*p*) *Wiscot's Case*, (1599) 2 Rep. 61 a. And a base fee will not merge, but enlarge. (Fines and Recoveries Act, 1833, s. 39.)

(*q*) 3 Prest. Conv. 182; *Hughes* v. *Robotham*, (1593) Cr. Eliz. 302.

(*r*) *Simpson* v. *Simpson*, (1838) 4 Bing. N. C. 333.

(*s*) *Snow* v. *Boycott*, [1892] 3 Ch. 110; *Barry Railway Co.* v. *Wimborne*, (1897) 76 L. T. 489.

are holden shall (upon application to the Court, and order made thereon), once in every year, if required, be produced to the court or its commissioners, or, upon neglect or refusal, they shall be taken to be dead; and the person entitled to the expectant estate may then enter upon and hold the lands, until it is shown that the life is still continuing.

CHAPTER VIII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

[WE come now to treat of estates, with respect to the number and connection of their owners. And estates of whatever quantity or length of duration, and whether they be in possession or in expectancy, may be held either in severalty, or in joint tenancy, or in coparcenary, or in common.

I. He that holds an estate in lands or tenements in *severalty*, or as sole tenant thereof, is he that holds it to himself only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most usual way of holding an estate; and there is nothing peculiar to be remarked concerning it. We shall therefore proceed to consider the other three species of estates, in which there is always a plurality of tenants.

II. An estate in *joint-tenancy* is where an estate is acquired by two or more persons in the same land, by the same title (not being a title by descent), and at the same period, and without any limitation by words importing that they are to take in distinct shares (*t*). For example, if there be a conveyance of lands to A. and B., without more, this makes them joint-tenants of the freehold; and if to A. and B. *and their heirs*, this makes them joint-tenants of the fee. The estate so acquired is called an estate in joint-tenancy (*u*), and sometimes an estate in *jointure*, which latter word, as well as the former, signifies an union or conjunction of interests; though in

(*t*) Co. Litt. 180 b. (*u*) Litt. s. 277.

[common speech the term *jointure* is usually confined to that estate, which, by virtue of the Statute of Uses, is created (as already explained) in full satisfaction and bar of dower.

An estate in joint-tenancy has several properties, which require to be distinctly pointed out. Of these the principal are the following:—1. Among joint-tenants there is a *unity of title*; that is, their estates must be created by one and the same act, as by one and the same grant or one and the same disseisin (*x*). 2. The estate of joint-tenants *vests in them, in general, at one and the same time* (*y*). Therefore, if, for example, an estate be granted to J. S. for life, with remainder to A. and the eldest son of B. (B. having no son at the time) and their heirs, A. does not take in joint-tenancy with B.'s eldest son; because A. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to B. And, even if a son is born to B. in J. S.'s lifetime, still A. had, up to that period, no joint interest with him; and the tenancy, not having been from the first a joint-tenancy, cannot become so afterwards. But, in the case of remainder to A. and B. and their heirs, after a previous life estate, A. and B. take in joint-tenancy, because they both take at once a vested remainder. If, however, the joint estate be limited by way of *use*, it is sufficient that the uses are *created* at the same time, not necessary that they should be *executed* together. Thus, if land be limited to the use of A. and any woman whom he may marry, for term of their lives, and A. afterwards marry, the use will operate to give him and his wife a joint estate during their lives (*z*). 3. Among joint-tenants there is also a *similarity of interest* as regards the quantity of estate. That is to say, one joint-tenant cannot be entitled to one quantity of

(*x*) Litt. s. 278.
(*y*) Co. Litt. 188 a.
(*z*) *Brent's Case*, (1575) Dyer, 340.

[estate, and the other to a different; one cannot be tenant for life and the other for years; one cannot be tenant in fee, and the other in tail (*a*). But they may be joint-tenants as to a portion of the fee, with a several interest in one or more of them as to the residue. Thus, if land be granted to A. and B. for their lives, and to the heirs of A., here A. and B. are joint-tenants of the freehold during their joint lives, and A. has a several inheritance in fee simple. Or if land be given to A. and B., and the heirs of the body of A., here both have a joint estate for life, and A. has a several inheritance in tail (*b*). 4. There is a *unity of possession* among the tenants. For, while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*. Notwithstanding this unity of possession, it was a rule of the common law, that if an estate in fee were given to a man and his wife, they were not properly joint-tenants, but were tenants by *entireties*. For, the husband and wife being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety, *per tout et non per my*. The consequence of which was, that neither the husband nor the wife could dispose of any part without the assent of the other, but the whole remained to the survivor (*c*); and if a joint estate in land was conveyed to husband and wife and a third party, the husband and wife took a moiety, and the third party took the other moiety, in the same manner as if the grant had been to two persons only (*d*).] Under the Married Women's Property Act, 1882 (*e*), a gift to a husband and wife will constitute them joint-tenants. But as to the third parties, the old rule is still in force; and a gift to A. and B. (husband and wife) and C., will confer upon C. an undivided moiety of the estate (*f*).

(*a*) Co. Litt. 188 a.

(*b*) Litt. s. 285.

(*c*) Co. Litt. 187 b; *Doe* v. *Purratt*, (1794) 5 T. R. 652.

(*d*) Litt. s. 291.

(*e*) 45 & 46 Vict. c. 75.

(*f*) *Jupp* v. *Buckwell*, (1888) 39 Ch. D. 148.

[From the unity of interest and possession in each of the joint-tenants results the incident of *survivorship*. For when two or more persons are jointly seised of any interest in lands, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last survivor, who shall be entitled to the whole estate (*g*). For one joint-tenant has not a distinct moiety from the other, but while the joint-tenancy continues each joint-tenant has a concurrent interest in the whole. And therefore it is that, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, nor yet a *separate* interest in any part of the tenements. And as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest is entire and several, and to the whole estate.

The right of survivorship is called by our antient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors; or as they themselves express it, "*pars illa communis accrescit superstitibus de personâ in personam, usque ad ultimam superstitem.*" And the rule is (*h*) that no dower or curtesy can be claimed out of a joint estate.

Joint-tenancy may be destroyed:—

1. *By partition.* Thus, if two joint-tenants agree by deed to part their lands, and to hold them in severalty, the effect thereof is to make them no longer joint-tenants, for they no longer hold *pro indiviso*. And the right of survivorship, also, is by such separation destroyed.

By the common law, all the joint-tenants might thus agree to make partition of the lands, but one of them could not compel the others (*i*). For this being an estate

(*g*) Litt. ss. 280, 281.
(*h*) Co. Litt. 31 b; 185 b.
(*i*) Litt. s. 290.

[originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without the consent of the others. But by the Partition Statutes of 1539 and 1540, (*k*) joint-tenants were, in case of refusal by any of them, made compellable by *writ of partition* to divide their lands. And though this writ, together with the other antient forms of real action, was abolished by the Real Property Limitation Act, 1833, joint-tenants are still compellable by action to make partition, or to submit to a sale and division of the proceeds (*l*).

2. *By alienation without partition.* As if one joint-tenant alienes and conveys his estate to a third person; here the joint-tenancy is severed, and turned into a tenancy in common. For the grantee and the remaining joint-tenant hold by different titles, one derived from the original, the other from the subsequent, grantor (*m*). And so, if one of two joint-tenants releases his share to the other, the joint-tenancy is dissolved, and turned to an estate in severalty (*n*). But a devise of one's share by will is no severance of the jointure, for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested (*o*).

3. *By an accession of interest.* Thus, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure. For such event renders the interests of the tenants dissimilar as regards the quantity of estate (*p*). But, if an estate be originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance;

(*k*) 31 Hen. 8, c. 1; 32 Hen. 8, c. 32.

(*l*) Partition Acts, 1868 and 1876.

(*m*) Litt. s. 292.

(*n*) Co. Litt. 273 b.

(*o*) Litt. s. 287.

(*p*) *Childs* v. *Wescol*, (1596) Cro. Eliz. 470.

[because, being created by one and the same conveyance, they are not separate estates, but branches of one entire estate (*q*).

Whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it. But if one of three joint-tenants alienes his share, the two remaining tenants, as between themselves, still hold their own shares by joint-tenancy and survivorship (*r*). And if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that share, yet the two remaining shares are still held in joint-tenancy (*s*).

In general, it is advantageous for the joint-tenants to dissolve the joint-tenancy; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous. As, if there be two joint-tenants for life, and they make partition, this dissolves the joint-tenancy; and, though before they each of them had a joint-estate at least for his own life, with a chance of survivorship in severalty, now each has an estate in a moiety only, and for his own life only. And, on the death of either, the reversioner shall enter on his moiety (*t*).

III. An estate in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons (*u*). And this estate arises either by common law or by particular custom. It arises by common law; as where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females. And these co-heirs are then called *coparceners*, or for brevity, *parceners* only (*x*). Parceners by particular custom are

(*q*) Co. Litt. 182 b.
(*r*) Litt. s. 294.
(*s*) *Ibid.* s. 304.
(*t*) Co. Litt. 191 a.
(*u*) Litt. s. 241.
(*x*) *Ibid.* 242.

[where lands descend, as in gavelkind, to all the *males* in equal degree, as sons, brothers, uncles, &c. (*y*).

An estate in co-parcenary resembles, in some respects, an estate in joint-tenancy, there being the same unities of title, interest and possession. But in the following respects they materially differ:—

1. Parceners always claim by *descent*, whereas joint-tenants always claim by *purchase*. For, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants (*z*). And hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or for years, may be held in joint-tenancy.

2. There is no *entirety of interest* among coparceners, although there is unity; but each of them is properly entitled to a distinct share (*a*). And, therefore, there is no *jus accrescendi* or survivorship between them; but each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and are held *pro indiviso*, so long are the tenants therein, whether male or female, called parceners.

3. Though the interests of coparceners accrue by the same title, yet *they may accrue at different periods*. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still coparceners (*b*), the estates vesting in each at different times, though it be the same quantity of interest, and held by the same title. And so there need be no *unity of time* among them.

4. And lastly, though persons related in equal degree to the ancestor are entitled in equal shares, yet as their heirs

(*y*) *Ibid.* s. 265.
(*z*) *Ibid.* s. 254.
(*a*) Co. Litt. 164 a.
(*b*) *Ibid.*

[will represent them, or stand in their place, there is no necessary *equality of interest* among co-parceners. As if a man die leaving four granddaughters, three of them the issue of an elder daughter, and one of them the issue of a younger daughter, all four shall inherit; but the daughter of the younger shall take a moiety, that is, as much as all the other three (*c*).

The modes of dissolving an estate in coparcenary are:—

1. *By partition.* Parceners are so called, saith Littleton, because they may be constrained to make "partition" (*d*). And he mentions many methods of making it, four of which are by consent and one was by compulsion (*e*). The first is, where they agree to divide the lands into equal parts in severalty. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise, as shall be agreed. This privilege of seniority is personal; for, if the eldest sister be dead, her issue shall not choose first, but the next sister. But if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, upon the first turn the eldest and her issue,—nay, her husband, or her assigns,—shall present alone, before the younger, to whom the next turn will in that case belong (*f*). For although the agreement to make partition is merely personal, yet this latter privilege, of presenting to the living, arises from the act of the law, and is annexed not only to the person of the eldest, but to her estate also. The third method of partition by consent is, where the eldest divides, and then she chooses last; the rule of law being, *cujus est divisio, alterius est electio.*

(*c*) *Ibid.* 164 b; and see *Cooper* v. *France*, (1850) 19 L. J. (N. S.) Ch. 313; *James* v. *Dickinson*, [1897] 2 Ch. 509.

(*d*) Litt. s. 241.

(*e*) Litt. ss. 243—246.

(*f*) Co. Litt. 166 b.

[And the fourth is, where the sisters agree to cast lots for their shares.] Partition by compulsion at the common law used to be, where one or more parceners sued out a *writ of partition* against the others; but, that writ being now abolished, partition of an estate held in coparcenary can at present be compelled only by the judgment of the court, to be obtained in a partition action.

[There are some things which are in their nature impartible. A mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance. Or, if that cannot be, then they shall have the profits of the thing by turns, as in the case of the advowson (*g*).

An estate in coparcenary may also be dissolved, (2) *by the alienation of one of the parties*, which destroys the unity of title (*h*); or (3) *by the whole at last descending to and vesting in a single person*, which brings it to an estate in severalty.

IV. A *tenancy in common* is, where two or more hold the same land, by several and distinct titles, but with unity of possession (*i*). And in a tenancy in common, there is not necessarily any unity of interest, title, or time. For if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; one may hold by descent, the other by purchase; one's estate may have been vested for fifty years, the other's but from yesterday.

Tenancy in common may arise out of a joint-tenancy, or out of a coparcenary. As if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common. For

(*g*) Co. Litt. 164 b, 165 a.

(*h*) *Doe* v. *Dixon*, (1836) 5 A. & E. 839.

(*i*) Litt. s. 292.

[they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*k*). And if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the respective donees in tail are tenants in common, as holding by different titles and conveyances (*l*). Also, if one of two parceners alienes, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase (*m*). So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances (*n*); because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and a woman*, and the heirs of their bodies begotten. And in these, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B. In short, whenever an estate in joint tenancy or in coparcenary is dissolved, *but no partition is made*, the undivided tenancy is turned into a tenancy in common.

A tenancy in common may also be created by an express limitation to that effect in a conveyance. But here care must be taken to insert words implying that the grantees are to take distinct, though undivided, shares; for a grant without such words would give a joint estate. And it is laid down in our books, that the common law favours joint-tenancy rather than tenancy in common (*o*), because the divisible services issuing from land (as, for example, rent) are not divided, and the entire services (as fealty) are not multiplied, by a joint-tenancy, as they are by a tenancy in common. Yet land

(*k*) Litt. s. 292.
(*l*) *Ibid.* s. 295.
(*m*) *Ibid.* s. 309.
(*n*) *Ibid.* s. 283.
(*o*) *Fisher* v. *Wigg*, (1700) 1 P. Wms. 17 (Holt's opinion); *Morley* v. *Bird*, (1798) 3 Ves. Jr. 628.

[given to two, to be holden, the one moiety to one, and the other moiety to the other, is an estate in common (*p*). And, if one grants to another *half* his land, the grantor and grantee are also tenants in common (*q*); because joint-tenants do not take by distinct moieties. And by such grants the division of the estate is so plainly expressed, that it is impossible that they should take a joint interest in the whole of the tenements.] And the presumption in favour of joint-tenancy does not apply in the case of wills, or of conveyances operating under the Statute of Uses (*r*). Moreover, though the legal estate be joint, the Court may hold that there is an *equitable* tenancy in common, and may compel the surviving joint-tenant to hold the legal estate as trustee for the representatives of the deceased (*s*).

We may take this opportunity of remarking, that when lands are given to two or more as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them—as if a man give lands to his children as tenants in common in tail, and direct that upon failure of the issue of one of them his share shall go over to the others in tail, and *vice versâ*. Such ulterior estates as these are called *cross-remainders*, because each of the grantees has reciprocally a remainder in the share of the other; and if two or more persons take under such a limitation, they will take as tenants in common (*t*). But it is a rule, that in a *deed*, cross-remainders can be given only by express limitation, and shall never be implied (*u*). Otherwise is it with respect to *wills*, which are here, again, expounded more liberally,

(*p*) Litt. s. 298.

(*q*) *Ibid.* s. 299.

(*r*) *Fisher* v. *Wigg*, *ubi sup.*

(*s*) *e.g.*, if the estate has been purchased with money belonging to the purchasers in separate shares, or as tenants in common. (*Re Jackson* (1887), 32 Ch. D. 732.)

(*t*) *Windham's Case*, (1589) 5 Rep. 8 a; *Doe* v. *Wainewright*, (1793) 5 T. R. 427.

(*u*) *Doe d. Clift* v. *Birkhead*, (1849) 4 Exch. at p. 124.

with a view to the presumable intent of the donor. So in wills, cross-remainders may be raised not only by actual limitation, but by an expression from which the design to create them can reasonably be inferred (*x*).

A tenancy in common may be dissolved: (1) *by partition;* for tenants in common, like joint tenants, were compellable by statutes, (though not by the common law,) to divide their lands by writ of partition. And since the abolition of that writ, they may be driven to a partition by means of proceedings in equity; as regulated by the Partition Acts of 1868 and 1876. Tenants in common may also effect a partition by mutual agreement without having recourse to the Court. A tenancy in common may also be dissolved: (2) by the *uniting of all the titles and interests in one tenant,* by purchase or otherwise; which brings the whole to one severalty.

(*x*) *Vanderplank v. King,* (1843) 3 Ha. 1.

CHAPTER IX.

OF USES AND TRUSTS.

HITHERTO, we have considered only such interests in land as are of a *legal* character, *i.e.*, such as were recognized by the old common law and the principles of feudal tenure. But there has long existed a very important class of interests, known as *equitable* interests, to which we must now turn our attention.

These equitable interests arose out of the desire, which early manifested itself, to create a beneficial ownership of land which should not be subject to the strict rules of feudal tenure. This desire seems first to have manifested itself among the religious Orders which settled in England at a very early period, and especially among the Mendicant Friars of St. Dominic and St. Francis. The objects of these bodies were to evade the military obligations attaching to feudal estates, the stringent regulations against Mortmain, and (in some cases) their own self-imposed vows of poverty. These objects they achieved, at least in part, by the ingenious invention known as an Use of lands.

The notion of the Use is, that the legal estate in land shall be vested in A., as a mere cover or protection of the beneficial enjoyment which is intended for B. All the purely formal powers and liabilities are to belong to A.; all the valuable rights to B. As Lord Bacon puts it, "pernancy of profits, execution of estates, and defence of the land," are the three points of the Use (*y*). That is to say, the *cestui que use* (as the owner of the Use is called) is to get the income of the land, to be entitled to call

(*y*) *Reading on the Statute of Uses* (ed. Spedding), vii. 401.

upon the legal owner to convey as he (the *cestui que use*) directs, and to have the benefit of the protection of the legal estate.

This notion was introduced into England before the end of the thirteenth century by means of the *feoffment to uses*. X. enfeoffed A. of lands *to the use of* (or *in trust or confidence for* (*z*)) B. A. thus became the legal owner of the estate, B. the beneficial owner. In the eye of the law, A. was the tenant of the land, subject to all the burdens and liabilities of tenure; B. was unrecognized, except, perhaps, by the Church courts, as in any way connected with the land. In other words, B. had no remedy against A., except on the ground of *conscience*.

[As regards the religious houses themselves, this evasive contrivance of Uses proved to be of little avail, being crushed in its infancy by the Mortmain Statute of 1391 (*a*), whereby it was enacted that, for the future, Uses should be subject to the Statutes of Mortmain, and forfeitable like the lands themselves, unless the licence of the Crown was first duly obtained. Yet the idea, being once introduced, took root in our system of jurisprudence, being chiefly recommended by two considerations:—one, that Uses were, as to the manner of their creation and transfer, and the modifications of interest to which they might be subjected, free from the restrictive rules which applied to the old feudal estates; the other, that Uses were not, in general, liable, like the feudal estates, to forfeiture for treason or felony. It was owing to this latter exemption in particular, that, during the wars in France and the subsequent civil commotions between the houses of York and Lancaster, Uses grew almost universal, through the desire that men had of securing their estates from forfeiture, when each of the contending parties, as they became uppermost, alternately attainted the other. And,

(*z*) It cannot be too early impressed upon the student, that no special words are necessary to create an Use. Any expressions which convey the purpose are sufficient.

(*a*) 15 Ric. 2, c. 5.

[from the beginning of the fifteenth century, we notice a gradual development and elaboration of the practice of Uses, under the care of the Court of Chancery, then rising into great importance.]

Uses were, as we have said, originally created by feoffment, accompanied by an express oral agreement of the feoffee, to hold the legal estate subject to the terms of the Use. But they might also be created by implication. Thus, if a man made a feoffment in fee to another, without any consideration, Chancery presumed that he meant it to be to the use of himself, and therefore raised an *implied* Use for his benefit; unless, indeed, the feoffor expressly declared that the feoffment was to the use of another, and then, of course, nothing was presumed contrary to such express declaration. Uses which thus returned by way of implication to the grantor himself, were called *resulting* Uses. An Use might also be raised upon a mere contract or covenant, without the formality of any conveyance (*b*). For if a man, in consideration of natural affection, *covenanted to stand seised of his land to the use* of some near relative named, or to the use of a wife, actual or intended, a court of equity, even though no valuable consideration passed, would enforce the Use, treating the covenantor thereafter as a mere trustee for the *cestui que use*. And if a man *bargained and sold* (*i.e.*, agreed to sell) his land to another for a pecuniary consideration, but made no actual feoffment or conveyance, Chancery would consider the estate as belonging to the party who had paid the money; and would consequently hold the bargainor to be seised of the land from thenceforth to the use of the bargainee.

[In general, all persons were capable of holding to an Use. But persons attainted and aliens were disqualified from doing so; and the doctrine was also established, that neither the king nor the queen, on account of their dignity royal, nor any corporation aggregate, on account

(*b*) *Chudleigh's Case*, (1589) 1 Rep. 139 b.

[of its artificial character, could be seised to any Use but their own. And the capacity of becoming a *cestui que use* was even more extensive; all persons who had capacity to accept a conveyance of land being also capable of accepting an Use.

As the person seised to Uses was considered by the common law as the absolute owner, his interest was of course subject originally to all the incidents which attached to the legal estate in ordinary cases. And therefore it devolved to his legal representative at his death, and might be alienated or forfeited by his act while living, or become subject to his debts, or escheat for want of his heir. The wife of the legal owner was also entitled to her dower out of the estate; and when the person seised to Uses was a married woman, her husband was entitled to his estate by the curtsey. Moreover, it was but very gradually that the *cestui que use* received protection against persons who purchased the legal estate from the feoffee to Uses; for the Court of Chancery originally gave relief only against the person himself in whom the trust was first reposed, and not against his alienees.] And a purchaser for value without notice, if he obtain the legal estate, still is, of course, entitled to hold it, regardless of the claims of the equitable owner (*c*).

The Use was in its nature so exclusively *equitable*, that the courts of common law accounted the *cestui que use*, if out of possession, a mere stranger, and if in possession, a mere tenant at sufferance. And they allowed no effect to an alienation or demise of the land, if made by the *cestui que use* without the consent of the trustee; nor was the Use liable to forfeiture for the default of the *cestui que use*, nor to execution for his debts. And though, in a court of equity, the properties or incidents of the Use were in great measure assimilated to those of the legal estate; yet, even there, the Use long retained marks of its peculiar origin.

(*c*) *Pilcher* v. *Rawlins*, (1872) L. R. 7 Ch. App. 259.

[The state of things above described was, however, attended with many inconveniences. For, in the words of Lord Bacon, "a man that had cause to sue for his "land, knew not against whom to bring his action, nor "who was the owner of it; the wife was of her thirds "defrauded, the husband of being tenant by the curtesey, "the lord of his wardship, relief, heriot and escheat; the "creditor of his extent for his debt; the poor tenant of "his lease" (*d*). To remedy these inconveniences abundance of statutes were provided; which made the land liable to be extended by the creditors of the *cestui que use* (*e*), allowed action for the freehold to be brought against him if in the actual pernancy or enjoyment of the profits (*f*), made him liable for waste (*g*), established his conveyances and leases made without the concurrence of the feoffees (*h*), and gave the lord the wardship of his heir, with certain other feudal perquisites (*i*).

These statutes all tended to make the *cestui que use* the real owner of the estate; and at length that idea was carried into full effect by the celebrated Act passed in the year 1535, in the reign of Henry the Eighth, which is commonly called the Statute of Uses (*k*). Which statute, after reciting the inconveniences before mentioned, enacts that, where any person or persons shall be seised of lands (*l*) to the Use, confidence, or trust of any other person or persons, or body politic, by any means whatsoever, (whether the Use, confidence, or trust were in fee simple or in fee tail, for life or for years, or otherwise, and whether in

(*d*) Bac. *Use of the Law* (ed. Spedding), vii. 497.

(*e*) 50 Edw. 3, (1376) c. 6; 19 Hen. 7, (1503) c. 15.

(*f*) 1 Ric. 2, (1377) c. 9; 4 Hen. 4, (1402) c. 7; 11 Hen. 6, (1433) c. 3.

(*g*) 11 Hen. 6, (1433) c. 5.

(*h*) 1 Ric. 3, (1483) c. 1.

(*i*) 4 Hen. 7, (1488) c. 17; 19 Hen. 7, (1503) c. 15.

(*k*) 27 Hen. 8, c. 10.

(*l*) The words in the Act are "honours, castles, manors, lands, "tenements, rents, services, re-"versions, remainders, or other "hereditaments." (27 Hen. 8, c. 10, s. 1.)

[possession, remainder or reverter,) the estate of the person or persons so seised to Uses shall be deemed to be in him or them that have the Use, trust, or confidence; and that he or they shall thenceforth stand and be seised or possessed of the said lands or other hereditaments, of and for the like estates as he or they had in the Use, trust, or confidence.

The effect of the statute is, therefore, to *execute* the Use; that is, it instantaneously, and as "by a kind of "parliamentary magic," transmutes the equitable interest of the *cestui que use* into a legal estate of the same nature, and makes the *cestui que use* the legal tenant, in lieu of the feoffee to Uses, whose estate is annihilated.] And thus under the statute the Use is *transmuted into possession*—not that the *cestui que use* really obtains actual possession (*m*), but that, the legal estate conferred on the *cestui que use* being considered as an estate in seisin, it requires no further ceremony for its completion. Thus, if a conveyance be made to A. and his heirs, to the use of B. and his heirs, an estate in fee simple in possession is *eo instanti* vested by force of the statute, and without livery of the seisin, in B.; and A. takes nothing (*n*).

But, it must be carefully noted that, in order to bring the statute into operation, it is essential that there should not only be an Use, but a person *seised* to the Use, the statute speaking of "one person *seised* to the Use of any other person." Therefore, where an existing term of years is limited to an Use, as where a term of 1,000 years is assigned to B. to the use of C., the provisions of the statute do not apply, and the Use will consequently remain unexecuted. For of such estates as these (being mere chattels), the termor is not *seised*, but only *possessed*; and therefore there is no person "seised to an Use" as the statute requires. Upon the same principle of close adherence to the words of the statute,

(*m*) *Lutwich* v. *Mitton* (1620) Cro. Jac. 604.

(*n*) *James* v. *Plant*, (1836) 4 A. & E. 766.

the seisin must be vested in a different person from the *cestui que use* himself; for otherwise the case does not arise of *one* person being seised to the use of *another* (*o*). And the seisin should be for an estate as extensive as the Use itself; for the statute only executes the Use so far as there is a corresponding seisin. Thus, if land be conveyed to A. for life, to the use of B. in fee, the statute will vest the legal estate in B. only during the life of A. (*p*). The strictness of this technical rule was the cause of a curious abstract controversy, which long agitated the legal profession. Thus, when land was conveyed by feoffment to A. and his heirs, to the use of B. for life, remainder to the use of his unborn sons successively in tail, remainder to the use of C. in fee, it was necessary, in order that the statute should transmute all these Uses into legal estates, that there should be a seisin out of which to execute not only the Uses *in esse* to B. and C., but also the Uses *in futuro* to the unborn sons of B. The question arose, where, after the execution of the feoffment, was the seisin out of which their future Uses were to arise. The doctrine which found most general favour was, that there remained in the feoffee, though not an actual seisin, yet a *scintilla juris*, or possibility of *future* seisin, to serve the future Uses as they came into *esse*. But now, by the Law of Property Amendment Act, 1860 (*q*), such future Uses are to take effect when and as they arise, by force of, and by relation to, the original seisin in the feoffee to Uses; but no *scintilla juris* is to be deemed to remain in the original feoffee to Uses.

The Statute of Uses has been, in other respects also, very rigorously construed by the judges. For, first, it was held that *no Use can be limited upon a Use*. The case which is usually quoted as the authority for this important rule is apt to be misunderstood, because the word "Use" does not appear in the first of the limitations

(*o*) *Meredith* v. *Joans*, (1632) Cro. Car. 244.

(*p*) *Meredith* v. *Joans*, *ubi sup.*

(*q*) Sect. 7.

described in it. J. *bargained and sold* to G. and his heirs, to the use of herself (J.) for life, remainder to the use of G. in tail. But the effect of the "bargain and "sale" was (as we have said) to make J. seised *to the Use of* G. and his heirs, which Use was at once executed by the statute. Consequently, all the subsequent Uses were *Uses upon Uses;* and these the Court declared *not to be executed,* because "an Use cannot be ingendered of an Use" (*r*).

It was held also, that *where the person entrusted has any active duty to perform, he cannot be considered as holding to an Use, or at least not to such an Use as the statute executes.* Thus, if lands be given to B. and his heirs, with a direction to *receive* and *pay over* the profits to C., this shall be no Use in C.; though, on the other hand, if the direction were to *permit* C. *to take* the profits, this would be an Use executed in C., there being no *active* duty in this latter case for B. to perform (*s*).

It will thus be seen, that, while the Statute of Uses effected a revolution in the creation and transfer of *legal* interests (a matter with which we shall deal in the chapter on Conveyances under the Statute of Uses) (*t*) it left practically untouched a large number of *equitable* interests, or Uses of the old kind, which are the proper subject of this chapter.

The Uses which were thus in courts of law excluded from the operation of the statute, did not fail to obtain protection from the courts of *equity.* For it was evident, that the person directed to hold to the Use was never intended by the parties to have any beneficial interest, and that his capacity was merely fiduciary. Therefore, the Court of Chancery determined, that though the purposes pointed out were not Uses executable by the statute, yet a *trust* subsisted in the person directed to

(*r*) *Tyrrell's Case,* (1557) Dyer, 155,

(*s*) See the decisions in 1 Eq. Ca. Ab. 383–4.

(*t*) *Post,* bk. ii., pt. i., ch. xviii

perform the purpose; and that such trust was binding, if not at law, yet in equity. Accordingly, the interests in question, though rejected at law as Uses, became established in equity as *trusts*. And, with regard to these, the Court of Chancery soon established certain important rules, of which the principal are as follows:

1. Trusts are frequently distinguished as *executory* or *executed*. They are executory, where the *cestui que trust* is to take through the medium of a future instrument of conveyance which the trustee is directed to execute for the purpose; they are executed, where no such future conveyance is contemplated, but the trust estate is completely limited in the first instance. Thus, where a settlement not only vests property in trustees, but goes on to prescribe in detail the objects of the trust and the duties of the trustees, the trusts are said to be *executed*, and the exact language of the settlor must be followed. But, if the settlement is merely in the nature of preliminary articles, or general directions, which will have to be carried out by a subsequent instrument, the trusts created by it are *executory*. And, in carrying out the articles, the Court will allow itself greater latitude in construing the settlor's words, so as to effect his real intention (*u*).

2. Trusts may be either *express* or *implied*. If, for example, the legal estate in land be conveyed to A. upon such trusts as the grantor shall afterwards appoint, or upon trusts which fail, it is clear that A. is not intended to hold the land for his own benefit. There arises, therefore, by necessary implication, until the appointment be made, and after the trusts have failed, a trust for the grantor (*x*). And such trusts, so raised by implication for the benefit of the grantor himself, are called *resulting* trusts. So also, if an estate be purchased in the name of one person, and the consideration-money is paid by

(*u*) *Stamford* v. *Hobart*, (1710) 3 Bro. P. C. 33.

(*x*) *Cottington* v. *Fletcher*, (1740) 2 Atk. 155.

another, the land purchased will be subject to a trust for the person by whom the money was paid (*y*). And an agreement for the sale of land, when once concluded, will create an implied trust in equity for the purchaser (*z*).

3. Though neither the Crown nor a corporation aggregate could be seised to any Use but its own, the case is said to be otherwise with respect to a trust (*a*); and it may be laid down generally, that every description of person capable of holding land, is capable also of being a trustee. It is also a maxim in equity, that a trust shall never fail on account of the disability of the person appointed to perform it, or even from the omission to appoint any trustee at all. For the court will in either case compel the execution of the trust, by the person in whom the legal estate is vested.

4. The estate of the trustee is subject at *law* to all the incidents which attend an ordinary ownership of land. It devolves, therefore, when he dies, to his legal representative; and is liable, while he lives, to alienation by himself. But the claim of the representative, and in general also of the alienee, is subject, in contemplation of equity, to the original trust. The only exception is with regard to alienees, who become such by purchase, for valuable consideration, and without notice of the trust. For here, if they actually acquire the legal estate, they are not bound by the trust, nor compellable in equity to its observance (*b*). For their claim is not inferior, in point of equity, to that of the *cestui que trust;* the consequence of which is, that the legal title of the purchasers takes effect for their benefit,

(*y*) *Dyer* v. *Dyer*, (1788) 2 Cox, 92.

(*z*) Sometimes the word "constructive" is used instead of the word "implied." A "constructive" trust would seem to be one imposed by law, independently of any presumed intention of the parties.

(*a*) *Sutton's Hospital Case*, (1612) 10 Rep. 23 (Corporations). The position of the Crown as trustee seems to be very doubtful. (*Rustomjee* v. *Reg.*, (1876) 2 Q. B. D. 74.)

(*b*) *Pilcher* v. *Rawlins*, (1872) L. R. 7 Ch. App. 259.

while the *cestui que trust* is left to his remedy against the alienor personally, for his breach of trust. On the other hand, where the legal estate still remains in the trustee or his legal representative, but the purposes of the trust are satisfied, he is always compellable to divest himself of the legal estate, by executing a proper conveyance to or in favour of the person beneficially entitled.

It is further to be noticed that, at *law*, the estate of the trustee was liable to be taken in execution for his debts, his wife was entitled to dower, and the husband of a female trustee was entitled to curtesy. But in equity, after some hesitation, the estate of the *cestui que trust* was ultimately protected against all these inconveniences resulting from the trustee having the estate at law (*c*). And, although the estate of the trustee was formerly liable also to forfeiture and to escheat, that was altered by the Trustee Act, 1850 (*d*), which provided that no lands, stock, or chose in action, held in trust or by way of mortgage, should escheat or be forfeited, so as to affect the interest of the *cestui que trust* or mortgagor.

5. As we have pointed out, the interest of the *cestui que trust* was not originally the subject of protection at all at law, but subsisted only in contemplation of equity. In contemplation of equity, however, it was the actual beneficial *ownership*, the *cestui que trust's* interest being modelled, in general, upon the rules of the common law with regard to legal estates, for *æquitas sequitur legem*. Thus, there may be an equitable interest (just as there may be a legal estate) for life or for years, in fee or in tail; and, in the case of an equitable estate tail, the method of barring the entail is the same as if the estate were legal. So, an equitable interest may be either in possession or in expectancy, as in the case of a legal

(*c*) *Finch* v. *E. of Winchelsea*, (1715) 1 P. Wms. 278 (debts); *Noel* v. *Jevon*, (1678) Freeman Ch. Ca. 43 (dower); Gilbert *Uses* (ed. Sugd.) 18 n. 1 (curtesy).

(*d*) Sect. 46.

estate. But where the equitable interest in expectancy is a *contingent remainder*, it was never subject to the common law rule whereby it was defeated in the event of the determination, before the contingency happened, of the particular estate upon which it depended; because the seisin of the trustee is sufficient to preserve it (*e*). The doctrine of "merger," however, seems to apply to equitable interests as well as to legal estates, if the coalescing estates be both of the equitable description, and the merger will not be productive of any injustice or inconvenience (*f*). So, the same rules of construction will in general apply to equitable as to legal estates; and particularly the *Rule in Shelley's Case* (*g*). A trust of inheritance is also subject to the curtesy of the husband of *cestui que trust*, equally as if it were an estate at law (*h*); and it is now subject to dower (*i*). Again, a trust estate, though formerly protected like an Use from execution for debt, is now made subject to such execution; for, by the Statute of Frauds, it was made liable to the extent of one-half, and by the Judgments Act, 1838, entirely, to be taken in execution on a judgment.

But a trust estate may also be subjected, like an Use, to limitations unknown to the common law; and it has always been capable of being created or assigned (even for an estate of freehold), by deed without livery, or by last will and testament. The only requirements of form attending its creation and transfer are those laid down by the Statute of Frauds, which requires a signed writing in all cases of creation or transfer of *express* trusts (*k*).

The estate of the *cestui que trust* was never subject to

(*e*) *Abbiss* v. *Burney*, (1881) 17 Ch. D. 211.

(*f*) *Brandon* v. *Brandon*, (1861) 31 L. J. Ch. 47.

(*g*) *Bale* v. *Coleman*, (1711) 1 P. Wms. 142.

(*h*) *Sweetapple* v. *Bindon*, (1705) 2 Vern. 536. (The rule is, of course, now subject to the right of the wife to dispose of her interest.)

(*i*) Dower Act, 1833, s. 2.

(*k*) 29 Car. 2, c. 3, ss. 7, 8, 9.

forfeiture, unless for treason; and it did not escheat for want of inheritable blood. For the defect of an heir conferred no title on the Crown or mesne lord, but merely enabled the trustee to hold the land discharged of the trust and for his own benefit (*l*). Forfeiture on conviction of crime is now, of course, abolished (*m*). But a recent statute (the Intestates Estates Act, 1884) has provided that on the death, intestate and without heirs, of a person entitled to an equitable interest in real estate, whether such interest is or is not devised to trustees by his will, the law of escheat shall apply as if the interest were a legal estate in corporeal hereditaments. It is very difficult to understand the real meaning of this curiously-worded provision; but it is probably intended to give the benefit of the escheat to the Crown in all cases (*n*).

Before concluding this chapter, it will be useful to refer (though the matter strictly belongs to a later chapter) to an important provision of the Land Transfer Act, 1897, which has obviated many of the difficult questions which formerly arose in connection with the *devolution* of trustees' estates. By the older law, these estates, if they were of the nature of heritable property, passed strictly to the *heirs* of the trustees. As these heirs were, however, often unwilling to perform trusts from which they could derive no benefit, great difficulties and expense were incurred in compelling them to transfer their interests to other persons. About thirty years ago, therefore, it became the policy of the Legislature to make trust estates held in fee simple descendible, not to the heirs of the trustee, but to his *personal representatives*—*i.e.*, to his executors or administrators (*o*). And, after several partial experiments (*p*), this policy has been

(*l*) *Burgess* v. *Wheate*, (1759) 1 Eden, 177.

(*m*) Forfeiture Act, 1870.

(*n*) *Attorney-General* v. *Anderson*, [1896] 2 Ch. 596.

(*o*) Vendor and Purchaser Act, 1874, s. 5.

(*p*) Land Transfer Act, 1875, s. 48; Conveyancing Act, 1881, s. 30.

carried into full effect by section 1 of the Land Transfer Act, 1897, which provides that *all* the real estate of a deceased person shall, on his decease, vest in his personal representatives. It must, however, be carefully observed that (1) where there are surviving trustees of a joint estate, the interest of the deceased trustee will go to the survivors by the *jus accrescendi*, and (2) that the provisions of the Land Transfer Act, 1897, s. 1, do not apply to copyholds (*q*). Whether the section includes estates tail, is a moot point; certainly the words are comprehensive enough. But it is the better opinion, that an estate tail cannot be made subject to a trust, although there can, of course, be an entail of an equitable interest.

(*q*) This point had been previously settled, as to trust estates of copyhold, by the Copyhold Act, 1894, s. 88. But see *In re Mills' Trust*, (1888) 40 Ch. D. 14.

CHAPTER X.

OF TITLE IN GENERAL.

HAVING said thus much of the tenures by which lands are held, and of the estates that may be had in them, we proceed now to consider the *title* to lands, or the manner of acquiring and losing estates therein; a consideration which will extend to equitable as well as to legal estates, but will be principally concerned with the latter. For equitable estates (as we have just seen) are capable of being created or transferred by much simpler methods than those in use at the common law, although conveyances of the same kind are, indeed, commonly used. And the rules of *descent* also are the same in both legal and equitable estates.

[In treating of the manner in which estates may be acquired and lost, we shall not have occasion to detach the consideration of loss from that of acquisition, for they are reciprocal ideas. By whatever method one man gains an estate, by that same method, or its correlative, some other man at the same time loses it. For where the heir acquires by descent, or the devisee by will, the ancestor or testator has first lost or abandoned his estate by death; where the lord gains land by escheat, the estate of the tenant is first of all lost by the extinction of his hereditary blood; where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession.

The acquisition of an estate in land is said to be either by *descent* or by *purchase*; or, again, the acquisition is said to be either by *act of law* or by *act of the parties* (*r*).]

(*r*) Co. Litt. 18 b.

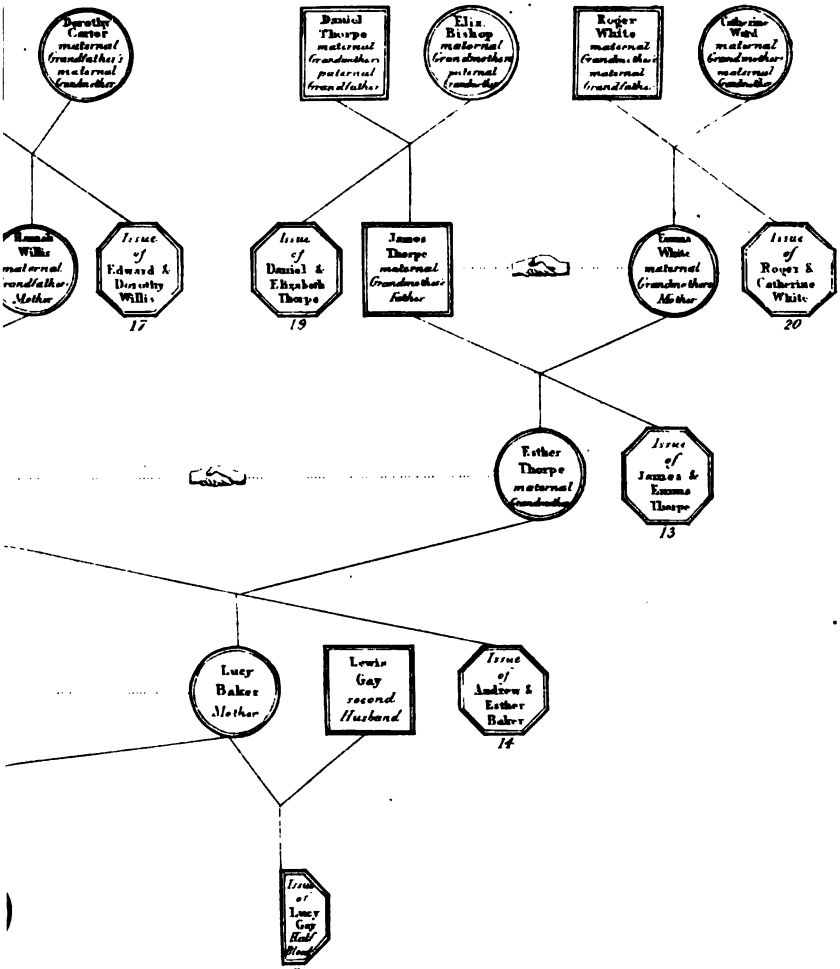
Title *by act of law* expresses all those modes of acquisition, where the law itself casts the right to the estate upon the acquirer, independently of any act or interference of his own, or of any other person for that purpose. Of these the principal kind is title by *descent;* but the term will also properly include title by *escheat,* and also that of tenant by the *curtesy,* and of tenant in *dower* (*s*).

Purchase, on the other hand, though in its vulgar and confined acceptation it is applied only to such acquisitions of land as are obtained by buying it for money or some other valuable consideration, yet it properly includes every lawful mode of coming to an estate *by the act of the party,* as opposed to the act of law (*t*). Among which our attention will chiefly be directed to the title by *occupancy,* by *forfeiture,* and by *voluntary transfer;* which last is usually described as that by *alienation* or *conveyance.*

(*s*) Co. Litt. 18 b.

(*t*) *Ibid.*

Maternal Line.


Dorothy Carter maternal grandfather's maternal Grandmother
Daniel Thorpe maternal Grandmother paternal Grandfather
Eliz. Bishop maternal Grandmother paternal Grandmother
Roger White maternal Grandmother maternal Grandfather
Catherine Ward maternal Grandmother maternal Grandmother
Issue of Edward & Dorothy Willis
17
Issue of Daniel & Elizabeth Thorpe
19
James Thorpe maternal Grandmother Father
Emma White maternal Grandmother Mother
Issue of Roger & Catherine White
20
Esther Thorpe maternal Grandmother
Issue of James & Emma Thorpe
13
Lucy Baker Mother
Lewis Gay second Husband
Issue of Andrew & Esther Baker
14
Issue of Lucy Gay Half Blood
0

CHAPTER XI.

OF TITLE BY DESCENT.

[DESCENT, or hereditary succession, is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation, as his *heir-at-law*. An heir, therefore, is he upon whom the law casts the estate on the death of the ancestor. And an estate so descending to the heir, is in law called an *inheritance*.

The doctrine of descents depends, in England, entirely on the principle of *consanguinity*, or kinship by blood, *i.e.*, the relationship of persons descended from a common ancestor. This consanguinity is either *lineal* or *collateral*.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between father and son, grandfather and granddaughter, and the like. Collateral consanguinity is that which subsists between persons who are descended from a common ancestor, but who are not descended from one another; as between brothers, cousins, uncles and nephews, and so on. Different systems of law have different methods of reckoning collateral degrees of consanguinity; but the English method (which has been adopted from the Canon Law) is as follows. We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the more remote of them, are or is distant from the common ancestor, that is the degree in which they are related to one another. Thus, brothers are related in the first degree, for from the father to each of them is only one; uncle and nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, *viz.*, his

[own grandfather.] But the importance of reckoning degrees of collateral kinship is now, *for the purposes of descent of real estate*, almost at an end. For the new method of tracing the inheritance prescribed by the Inheritance Act, 1833 (*u*), which governs all descents taking place on a death which has happened since 31st December, 1833, entirely ignores direct relationship between collaterals, and provides that they shall inherit from one another only as representing the common ancestor (*x*). Thus, if A. die intestate and without issue, his brother B., if he inherits A.'s estate at all, will do so, not as A.'s brother, but as representing their common father, to whom on failure of A.'s issue, the estate will first descend. [No inheritance can vest, nor can any person be the heir of another, till that other is dead; for *nemo est hæres viventis*. And, until such death, he can be at the most but an heir *apparent* or heir *presumptive*. An heir *apparent* is one whose right of inheritance is indefeasible, provided he outlives the ancestor; *e.g.*, the eldest son, who must by the course of the common law be heir to the father whenever the latter happens to die. An heir *presumptive* is one who, if the ancestor should die immediately, would be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born before the death; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child, or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter; in the two former cases, the estate shall be divested and taken away by the birth of a posthumous child. And, in the latter case, it shall also be totally divested by the birth of a posthumous son (*y*).]

(*u*) 3 & 4 Will. 4, c. 106.
(*x*) *Ibid.* ss. 5, 6.
(*y*) *Goodtitle* v. *Newman*, (1774) 3 Wils. 516.

The ancient rules of descent, which are still applicable in tracing the inheritances of persons who died before the 1st January, 1834, were based, partly on the common law, or general custom of the realm, which became fixed and generally recognized about the end of the thirteenth century, partly on the special customs of different localities, known as *Gavelkind*, *Borough-English*, and the like (*z*). The modern rules of descent depend largely, but not entirely, on the Inheritance Act, 1833, which is applicable in all cases in which the person whose heir is to be found died after the 31st December, 1833, except when the lands in question are governed by some special custom. In treating of the subject, therefore, we shall state the canons of descent as they are left by the Inheritance Act, 1833, referring, however, to the important points in which these differ from the antient rules (*a*).

But before proceeding to state the actual canons of inheritance, it is necessary to warn the student that, by the provisions of a recent Act of Parliament, the Land Transfer Act, 1897, these canons have, in effect, become now, in most cases, rules affecting only the *beneficial* interest in the inheritance. For it is enacted by that statute (*b*), that, upon the death, testate or intestate, of any owner of real estate which does not pass by survivorship to any other person, that real estate (if capable of descending at all) shall become vested in his *personal representatives* (*i.e.*, his executors or administrators), for the purposes of the administration of his estate. It is, however, provided by the same Act (*c*), that such representatives shall hold the estate (after satisfaction of the deceased's liabilities) in trust for the persons beneficially entitled thereto; and thus the canons of inheritance are

(*z*) See *ante*, Introduction. Sect. III., p. 20.

(*a*) To illustrate these points of difference, Blackstone's *Table of Descents* under the old law has been reprinted.

(*b*) Sect. 1 (1).

(*c*) Sect. 2 (1).

ultimately applicable to the devolution of the estate. Moreover, as the Land Transfer Act does not apply to copyholds (*d*), and it is very doubtful if it applies to estates tail in socage, it will be seen that the canons of inheritance have still a large application in cases of intestacy, whether the latter arise through entire omission of the deceased to make a will, or from total or partial failure of the provisions of his will.

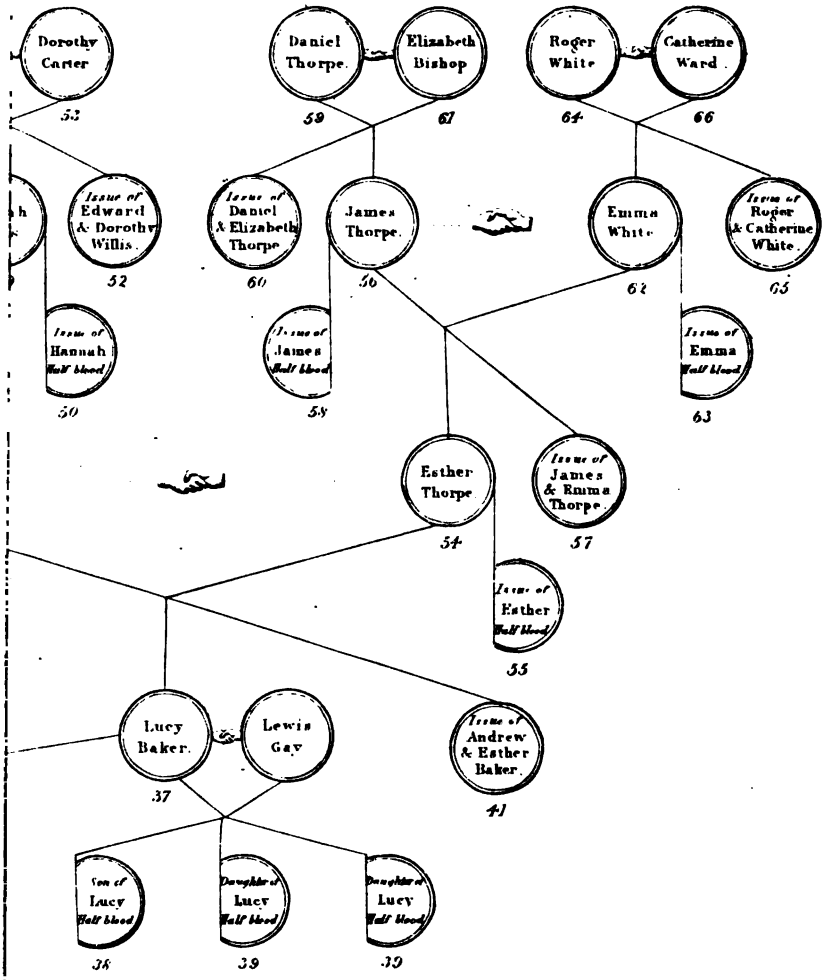
Subject to these preliminary explanations, we may now proceed to state the canons of inheritance.

I. *In every case the descent shall be traced from the purchaser.* The Inheritance Act, 1833, itself defines "*the purchaser*" as meaning and denoting "the person "who last acquired the land *otherwise than by descent*" (*e*). Wherefore, if the deceased owner of an estate in fee simple came to it by purchase, that is, in any other manner than by descent, the party claiming it as heir must make *him* the *propositus*, or person from whom consanguinity is to be traced; while if he came to it by descent from some purchasing ancestor, *that ancestor* must be made the *propositus*. Thus, if John Stiles, in the annexed Table of Descent (No. II.), die, leaving an estate which he acquired by purchase, any person claiming that estate as heir must prove that he is heir to John Stiles. But if John die owner of an estate which descended to him from Geoffrey his father, by whom it was originally purchased, the claimant must prove that he is heir to Geoffrey the father, Geoffrey becoming in that case the *propositus* instead of John. The effect of which rule is that (in the first instance, at least) no relation of John *ex parte maternâ* could, as such, inherit. But if the estate descended to John from Lucy Baker,

(*d*) Sect. 1 (4).

(*e*) Sect. 1. The Act says—"otherwise than by descent, or "than by any *eschat*, *partition*, *or* "*inclosure* by the effect of which "the land shall have become part "of or descendible in the same "manner as other land acquired by "descent."

Maternal Lines



his mother, and she (Lucy) was the purchaser, the descent must in that case be traced from *her*; and John's relations *ex parte paternâ* are (at least in the first instance) necessarily excluded. And inasmuch as it often happens, especially in long descents, that it is uncertain by whom an estate was originally purchased, the Inheritance Act provides against this difficulty of proof, by the following rule of *evidence*, viz., that the last owner, or person "last entitled to the land," shall be considered to have been the purchaser, *unless it shall be proved that he inherited it;* and the same rule is to be constantly applied at every step upwards of the pedigree (*f*). Therefore, if John Stiles is the person last entitled to an estate, and dies, and it does not appear whether he purchased it or not, the claimant must prove descent from *him.*

This first canon is mainly founded on the antient maxim, that *none shall claim as heir who is not of the blood of the purchaser* (*g*), [a maxim which cannot otherwise be accounted for than by recurring to feudal principles. For when feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be lineally descended from the first feudatory or purchaser; and if therefore a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring,—not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But, if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then (on failure of his own descendants) his brother, or such other collateral relation as was descended, and derived his blood from the first feudatory, might succeed to such inheritance. The true feudal reason for which rule was this, that what was given to a man for his personal merit, ought not to descend to any but the heirs of his person.

(*f*) Sect. 2. (*g*) Co. Litt. 12 a.

[And therefore, as now in estates tail, (which a proper feud very much resembled,) so in the feudal donation, "*nomen hæredis, in primâ investiturâ expressum, tantum* "*ad descendentes ex corpore primi vassali extenditur; et* "*non ad collaterales, nisi ex corpore primi vasalli sive* "*stipitis descendant*" (*h*).]

However, in process of time, when the feudal rigour somewhat abated, a method was invented to let into the inheritance the collateral relations, on failure of the lineal descendants of the grantee, by granting to the latter a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed to a feud derived from his ancestors. And then, though the lineal ancestors themselves were always excluded, for reasons which will hereafter appear, yet the collateral relations of the purchaser, that is the lineal descendants of those ancestors, were admitted to succeed, even *in infinitum*, because they *might* have derived their blood from the first (imaginary) purchaser. For since it was not ascertained, in such general grants, whether this feud should be held *ut feudum paternum* or *feudum avitum*, but merely that it should be held *ut feudum antiquum*, as a feud of indefinite antiquity, (that is, since it was not ascertained from which of the ancestors of the real purchaser this feud should be supposed to have descended,) the law would not ascertain it either, but would suppose any of his ancestors *pro re natâ* to have been the first purchaser. And therefore it admitted any of his collateral kindred (who had the other necessary requisites) to the inheritance; because every collateral kinsman must be descended from some one of his lineal ancestors.]

The old feudal principle of descent from the purchaser having thus been reduced to the level of a mere fiction, it ultimately gave way, in effect, to another maxim—*seisina facit stipitem*. The immense importance attached by the common law to the fact of seisin, or feudal

(*h*) Craig, *Jus Feudale* i. 9, 36.

possession, of which we have previously spoken, resulted, even before Littleton's time, in the firm establishment of the rule, that descent should in all cases be traced from the *person last seised* (*i*). And the seisin which was thus required to make the stock of descent was (as in the case of curtesy) *actual* seisin, or seisin *in deed*, not mere seisin in law, or title to possession (*k*). Thus, if Geoffrey Stiles, the father, had died seised of land of which he was the purchaser, and which descended to John as his heir, and John died before entry, the next claimant had to make himself heir to Geoffrey; but if John had entered and obtained actual seisin, it would then have been necessary to claim as heir, not to Geoffrey, but to John. And the difference was material; because the heir to the person last seised and the heir to the purchaser were not necessarily the same person. If John, for example, died leaving a half-brother, his father's son, the latter might possibly, on John's decease, be next heir to Geoffrey the father; but it was impossible, as the law then stood, that he should be heir to John, descent not then being allowed between those related by the half-blood (*l*). The rule of which we speak did not make it the less necessary, indeed, that the claimant should be of the *blood* of the purchaser; for this, in every case of descent, was universally required. But, if he had that qualification, and could make himself heir to the person last seised, he was entitled to succeed, whether he could make himself heir to the purchaser or not; while, on the other hand, his being heir to the purchaser was not sufficient, unless he was also heir to the person last seised. Thus, if John Stiles had purchased land and died actually seised, leaving no other kindred than his father's brother and his own brother of the half-blood (his father's son), the uncle would have been his heir, as the brother (by the rule already noticed) could not have claimed in that character. But, if the uncle had

(*i*) Co. Litt. 11 b.
(*k*) *Ibid.*
(*l*) Litt. s. 6.

also obtained seisin and died, without other kindred than John's half-brother, the latter would then have been entitled to succeed; for he would have been heir to the person last seised, and of the blood of the purchaser, though not the heir of the purchaser. On the other hand, if John Stiles had inherited land purchased by Geoffrey, who died seised, but had died without obtaining seisin, his half-brother (his father's son) would have inherited, to the exclusion of his uncle, because he was not merely of the blood of the purchaser, but heir to the person last seised (*m*).

It is to be observed, however, that in many cases to trace descent from the person last seised amounted in effect to the same thing as tracing descent from the purchaser. For, where the last owner happened to have been in fact the purchaser of the estate, he would usually also be the person last actually seised. Thus, if it were an estate in possession acquired by feoffment, this implied a real delivery to him of the actual seisin; and supposing it to have been acquired by devise (under the Statute of Wills), or by a conveyance under the Statute of Uses (of the nature of which we shall speak hereafter), the case would be in effect the same, for the actual seisin (so far at least as would suffice to make him the root of descent) would here be transferred to him, without entry, by mere construction of law (*n*). So if his estate were a reversion or remainder in fee expectant on a term of years, he would be clothed with an actual seisin of the fee, through the medium of the possession of the particular tenant. In all such cases, therefore, if the claimant made himself heir to the purchaser, he would also make himself heir to the person last actually seised; and so would satisfy both the conditions required to make out a descent in fee simple.

The new rule of descent discards the antient maxim,

(*m*) *Goodtitle* v. *Newman*, (1774) 3 Wils. 516.

(*n*) Co. Litt. 111 a, 266 b.

seisina facit stipitem, and establishes that descent shall be traced from the purchaser—a rule simple and uniform, and at the same time easy and certain in its application; while, under the old maxim, it was sometimes difficult to determine what would amount to a seisin sufficient to constitute a *stipes*. And it was highly unsatisfactory besides, that the right to the succession should in any case depend on so unimportant a circumstance as the omission of the owner to make entry before his death, on the land he had acquired by inheritance.

Before we dismiss this first rule or canon of descent, it is, however, well to point out, that the Inheritance Act, 1833, has made special provision for three cases in which it might be questioned who the purchaser actually was. Under the old law, if A. devised lands to the person who, on his (A.'s) death, actually became his *heir*, for the same estate which he would have taken by descent, if A. had died intestate, the devise would have been inoperative, and the devisee would have taken, not by *purchase*, but by *descent* (*o*). The contrary rule, however, is now established by the Inheritance Act (sect. 3), which says, that "when "any land shall have been devised by any testator who "shall die after 31st December, 1833, to the heir, or to "the person who shall be the heir of such testator, such "heir shall be considered to have acquired the land as a "devisee, and not by descent:" and accordingly he will now be the *purchaser* for the purposes of tracing future inheritance. Again, where land was limited by any assurance to the conveying party, or to his heirs, the rule of the common law was, that such grantor, feoffor, or testator acquired nothing by such assurance, but was entitled as of his former estate (*p*); but it has now been provided by the same section of the Inheritance Act, that "when any land shall have been limited by any assurance "executed after the 31st of December, 1833, to the

(*o*) Co. Litt. 22 b; *Reading* v. *Royston*, (1703) 1 Salk. 242.

(*p*) Co. Litt. 22 b.

"person or to the heirs of the person who shall thereby "have conveyed the same land, such person shall be "considered to have acquired the same as a purchaser by "virtue of such assurance, and shall not be considered to "be entitled thereto as of his former estate or part "thereof." Finally, if there be a limitation in an assurance executed after 31st December, 1833, or in the will of a testator who died after that date, to the "heirs" or "heirs of the body" of any one, there, although such person or persons take by purchase (because no estate is limited to their ancestors), yet, by section 4 of the Inheritance Act, in case of future descents, *the person whose heirs they are* will be treated as the purchaser, until the estate has again changed hands by purchase (*q*).

II. The second rule or canon of descent is, that *inheritances shall in the first place lineally descend to the issue of the purchaser in infinitum.* [And this principle of placing the lineal descendants first in succession to their ancestor is, under all systems of descent, invariably adopted, and may be said to be of universal obligation or propriety. For the possessions of the parents naturally go, upon their decease, in the first place to their offspring, as those to whom they have given being, and for whom they are therefore bound to provide.] But, when we say that the inheritance will descend to the issue of the purchaser *ad infinitum*, we must, of course, understand, that the nearer degree entirely excludes the remoter degree which is descended from it. Thus, no grandson can claim as heir to his paternal grandfather, if his (the grandson's) own father be living; although, if his mother be dead, the grandson may well claim to be heir of *her* father, i.e., his own maternal grandfather.

(*q*) The effect of this rule is, that if land be limited to A. for life, remainder to the heirs of B., B.'s heir, though he takes by purchase, will not, on his own death intestate, be the stock of descent, but the descent will be traced from B.

[III. The third rule or canon of descent is, *that, between persons in the same degree, males are preferred to females; and that, among males, the elder is preferred to the younger, but that females take equally.*

The preference of males to females is, perhaps, attributable to that imperfect system of feuds which obtained here before the Conquest, especially as the same preference exists in gavelkind; for we find that in the so-called Laws of King Henry the First, it is plainly recognized (*r*). But its complete adoption is clearly due to the policy of the feudal law, according to which females could never succeed to a proper feud, being incapable of performing those military services for the sake of which that system was established. Nevertheless, our law does not extend to the total exclusion of the female, as the Salic law does; it only postpones them to males. For, though daughters are excluded by sons, yet they succeed where there is no son; our law thus steering a middle course between the actual rejection of females and the putting them on a level with males.]

Thus, to take an illustration from our Table (No. II.), on the death of John Stiles, the purchaser, intestate, his eldest son, Matthew, if living, will succeed to the whole of his estate, whether it be in fee simple or fee tail general. If, however, Matthew be dead, leaving no issue, the whole inheritance will descend on Gilbert. If both Matthew and Gilbert be dead without issue, Margaret and Charlotte will take equally, as *co-parceners*. But, if either Matthew or Gilbert have left issue, that issue will succeed immediately after the claim of their deceased parent has been proved to be incapable of enforcement, owing to his death. And, among themselves, the same rules of preference will be observed. Finally, if Matthew and Gilbert are both dead, leaving no issue, but Margaret has died, leaving a son, Margaret's son will inherit his

(*r*) *LL. Henrici Primi* (Schmid), c. 70, s. 21. (The passage is of very doubtful meaning.)

mother's share of the inheritance, as co-parcener with his aunt Charlotte.

IV. The fourth rule or canon of descent is, that *the issue in infinitum of any deceased person in the line of descent represent their deceased ancestor, being preferred amongst themselves strictly in accordance with the third canon* (*s*).

[Thus, the child, grandchild, or great grandchild, either male or female, of the eldest son, succeeds before the younger son; and these representatives shall take neither more nor less than, but just so much as, their ancestors would have done. As if there be two sisters, Margaret and Charlotte, and Margaret dies leaving six daughters, and then John Stiles, the father of the two sisters, dies without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done had she been living, that is, a moiety of the land of John Stiles, in co-parcenary with Charlotte. So that, upon partition made, if the land be divided into twelve parts, Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, shall have one a-piece (*t*).

This taking by representation is called succession *per stirpes*, since all the branches inherit the same share that their root (*stirps*), whom they represent, would have done. And by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady. For the issue of the eldest son excludes all other pretenders, as the son himself, if living, would have done. But the issues of two daughters divide the inheritance between them, as their mothers, if living, would have done. And among the several issues or representatives of the respective roots, the same prefer-

(*s*) Hale, *History* (ed. Runnington), 265.

(*t*) *Cooper* v. *France*, (1850) 19 L. J. (N. S.) Ch. 313; *James* v. *Dickinson*, [1897] 2 Ch. 509.

[ence of males to females and the same right of primogeniture in males obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies, the eldest son of A. shall succeed to the whole of his grandfather's estate. And if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son; in such case the eldest son of C. shall succeed to one-third, the two daughters of D. to another third, and the son of E. to the remaining third. The right of representation does not appear to have been fully established in the time of Henry the Second, when Glanville wrote; and, in the title to the Crown especially, we find frequent contests between the younger (but surviving) brother, and his nephew (being the son and representative of the deceased elder brother). But, by the time of King Henry the Third, the right of representation was indisputably settled (*u*).]

V. The fifth rule or canon of descent is, that *on failure of the issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor and his issue in infinitum.*

This descent to the lineal ancestor, although it appears to have prevailed among the Anglo-Saxons (*x*), has been only recently introduced into our law, [for it was an express rule of the feudal law, that "*successionis feudi talis est natura quod ascendentes non succedunt.*" And so early as Glanville's time we find it laid down as an established law, that *hæreditas nunquam ascendit* (*y*). Nor was the feudal maxim unreasonable in itself. For if the feud of which the son died seised was really *feudum antiquum*, or one descended to him from his ancestors,

(*u*) Bract. lib. ii. ch. 30, s. 2.
(*x*) *LL. Hen. Prim.* 70, s. 20.
(*y*) Glanv. lib. 7, ch. 1.

[the father could not possibly succeed to it, because it must have passed through him in the course of its descent to the son; unless indeed it were *feudum maternum*, when the father would be excluded as not deriving his blood from the purchaser. And if the feud of which the son died seised were *feudum novum* strictly so-called, or were *feudum novum* held *ut feudum antiquum*, in either case the feud would not go to the father, because of the rule that only descendants of the original feudatory could succeed to the feud.] But the rule which excluded the father, was felt, in later times, to be opposed to natural justice, which seemed to dictate that a man's progenitors should be allowed to inherit his estate, by a right second only to that of his posterity. And such accordingly is now the law, the Inheritance Act, 1833 (sect. 3), having provided that "every lineal ancestor shall be capable of "being heir to any of his issue; and in every case where "there shall be no issue of the purchaser, his nearest "lineal ancestor shall be his heir in preference to any "person who would have been entitled to inherit, either "by tracing his descent through such lineal ancestor, or "in consequence of there being no descendant of such "lineal ancestor; so that the father shall be preferred "to a brother or sister, and a more remote lineal ancestor "to any of his issue, other than a nearer lineal ancestor "or his issue."

VI. The sixth rule or canon of descent is, that, *among the lineal ancestors of the purchaser, the paternal line is always preferred to the maternal.* This preference of the paternal line, though derived from the principles of feudalism, is now based on the express provisions of the Inheritance Act, 1833 (sect. 7), that "none of the "maternal ancestors of the person from whom the descent "is to be traced, nor any of their descendants, shall be "capable of inheriting until all his paternal ancestors "and their descendants shall have failed; and also that

"no female paternal ancestor of such person, nor any of "her descendants, shall be capable of inheriting until all "his male paternal ancestors and their descendants shall "have failed; and that no female maternal ancestor of "such person, nor any of her descendants, shall be "capable of inheriting until all his male maternal "ancestors and their descendants shall have failed." It is, probably, also to this preference of males to females that we owe the mysterious and not very important rule laid down in the following section of the Act, to the effect that "where there shall be a failure of male "paternal ancestors of the person from whom the descent "is to be traced, and their descendants, the mother of his "more remote male paternal ancestor, or her descendants, "shall be the heir or heirs of such person, in preference "to the mother of a less remote male paternal ancestor, "or her descendants; and where there shall be a failure "of male maternal ancestors of such person, and their "descendants, the mother of his more remote male "maternal ancestor, and her descendants, shall be the "heir or heirs of such person, in preference to the "mother of a less remote male maternal ancestor, and "her descendants."

VII. The seventh rule or canon of descent is, that, *among collaterals, those of the half-blood of the purchaser may inherit, but only after collaterals of the whole-blood in the same degree; that is, next after the collaterals of the whole blood when the common ancestor is a male, and next after the common ancestor, when the latter is a female.*

This canon, which is one of the most important of the changes introduced by the Inheritance Act, 1833 (*z*), is a logical consequence of the two former rules, one of which admits the lineal ancestor to succeed, and the other recognizes the issue of a deceased person as representing their ancestor. As between ancestor and issue, there can,

(*z*) Sect. 9.

of course, be no half-blood; and therefore it became necessary to admit, as heirs of the purchaser, persons who might be of the half-blood *to him*. Under the old law, where succession took place directly between collaterals, the half-blood was sternly rejected, except in one or two very rare cases. The change is so important, that a few words must be said in explanation of it.

[A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's blood is compounded of the bloods of his respective ancestors, so he only is of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood, that the other hath. Thus, to refer again to our Table (No. II.), the blood of John Stiles being composed of those of Geoffrey Stiles, his father, and Lucy Baker, his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles. But if, after the death of Geoffrey, Lucy Baker marries another husband, Lewis Gay, and hath issue by him, the blood of this issue, being composed of the blood of Lucy Baker (it is true) on the one part, but of that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Styles.]

In the admission of the half-blood, the Inheritance Act has introduced a new principle of inheritance. For, as the law before stood, the half-blood (like the lineal ancestor) were totally excluded, and the land would rather have escheated to the lord than have gone to any kinsman (however near) of the half-blood. Nay, even when a father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue, still B., the son of the same father by another wife, could not have been heir to these lands, because he was only

of the half-blood to A., the person last seised. But they would have descended to a sister (if any) of the whole blood to A.; for in such cases the old maxim applied, that *possessio fratris facit sororem esse hæredem.* Yet, if A. had died without entry, then B. might have inherited; not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised (*a*). But now, by virtue of the Act, the half-blood will inherit, next after the whole-blood. And the wording of the latter part of our canon, which is taken directly from the Act, though at first sight a little puzzling, will be found on application to be merely the result of the general rules of inheritance. For, to turn once more to our Table, if, on the death of John Stiles, all his issue are dead, his father, Geoffrey Stiles, will be his heir. But, if Geoffrey also be dead, Francis and Oliver Stiles, and their descendants, will be the heirs of John, as representing Geoffrey. If these, however, be all dead, we then come, by the half-blood rule, to Geoffrey junior (No. 8), and his issue, or, failing them, to his sisters (Nos. 9 and 10) and their issue. In these cases, it is to be observed, the common ancestor (Geoffrey senior) is a male. And it is not until the whole of John's paternal ancestors are exhausted, that we turn to his mother, Lucy, who will have the first claim (by Canon VI.) among his maternal relatives. But if she be dead, there can be no recourse to her descendants of the whole-blood to John, for *they*, being descendants of John's father, are already exhausted. And so we come to Lucy's descendants by Lewis Gay, who take next after her, *the common ancestor, in this case, being a female.*

The Inheritance Act of 1833 has, apparently, worked so well in practice, that the decisions upon it are few, and very little alteration has been made in its provisions. It is, however, necessary to call attention to one rather important amendment introduced by statute in the year

(*a*) Hale, *History* (ed. Runnington), 267.

1859. It will be remembered that the Inheritance Act makes the purchaser in every case the stock of descent. Difficulties about proof of title are also provided for by the second section of the Act, which lays it down, that, in every case, the person last entitled is to be *deemed* to have been the purchaser, unless the contrary is proved. But suppose that the purchaser is perfectly well known, and that he is absolutely without heirs, lineal or collateral. As the law stood until 1859, there must have been an escheat of the inheritance. But, by the Law of Property Amendment Act of that year (commonly known as Lord St. Leonards' Act), it is provided (*b*) that "where there "shall be a total failure of heirs of the purchaser (or "where any land shall be descendible as if an ancestor "had been the purchaser thereof, and there shall be a "total failure of the heirs of such ancestor), then and in "every such case the land shall descend, and the descent "shall thenceforth be traced, from the *person last entitled* "*to the land as if he had been the purchaser thereof.*" The result of this somewhat technically worded section is this, that if, for example, A., who has *inherited* lands from his father, the purchaser, die intestate and without issue, his mother and her relations will be able to succeed on failure of his paternal relations, whereas, but for the Act of 1859, they could never have done so, because they are not of the blood of the actual purchaser.

Having now brought our account of the present law of descent to a close, we may remark, as the result of the investigation, that, upon the death of the owner of an estate in fee simple, we are to ascertain the heir, by considering, first, who was the *purchaser?* We are then to look for his heir, first, among his issue, where the heir will be his descendant next to him in blood, but subject to the principles which obtain as to sex, primogeniture, and representation. Failing his issue, we must look

(*b*) Sect. 19.

among his lineal ancestors or their issue, where the heir will be his lineal ancestor next in blood in the preferable line, or the issue of such ancestor, if deceased, the principle which prefers the whole to the half-blood being also at each step regarded. And then, on the total failure of any heir of the purchaser proper, the person last entitled (although entitled by inheritance) is to be deemed the purchaser, and the like investigation on that basis is to be repeated through all its successive stages. If the reader will apply these rules to the Table (No. II.), he will find that, whether he regards John Stiles as the actual purchaser, or as the fictitious purchaser under the Act of 1859, the order of succession will follow in the sequence of the numbers attached to the different persons named in the pedigree.

Before we conclude this chapter, it will be proper to notice also two points of law connected with title by descent:—

1. Where a man acquires lands by descent, the lands retain the inheritable quality which they had in the purchaser or *propositus;* wherefore a paternal inheritance never passes over to the maternal heirs of the person last entitled, nor will a maternal inheritance pass over to the paternal heirs of such person. And in this respect the title by descent differs remarkably from that by purchase; for by the latter the estate acquires a new inheritable quality, and is descendible to the owner's heirs in general, that is, first to those of the paternal, and then to those of the maternal line. It follows, that if a person who has acquired an estate by descent conveys it to a purchaser, the line of descent is *broken;* and even if that purchaser conveys it back again to him, the interruption still continues. For the former owner will then hold it as by *purchase*, and not as by descent, and will therefore be able to transmit it to his heirs on either the paternal or the maternal side. Thus, if a man seised of lands as

the administration of the deceased's estate; and the liability of *equitable* interests in fee simple for payment of their deceased owner's debts was made statutory by the Statute of Frauds in 1677, which also made estates *pur auter vie* legal assets for the benefit of the creditors of a deceased owner (*f*). Until the year 1691, however, an unconscientious testator was able to defeat the claims, even of his specialty creditors, by *devising* his lands to strangers; for the claim of the creditor was only against the *heir*, unless indeed the testator had charged his lands with the payment of his debts. But by a statute of that year, commonly known as the Statute of Fraudulent Devises, a creditor in such circumstances was enabled to sue the devisee along with the heir, and thus to defeat the operation of the latter's plea of *riens per descent* (*g*).

It will be observed, however, that, up to this point, *specialty* creditors had a great advantage over creditors by simple contract, inasmuch as they were alone entitled to be paid out of *legal* assets, *i.e.*, such assets as could be reached by suing the heir or devisee directly, without recourse to a suit in equity. This advantage they continued to enjoy, at least to some extent, until less than half a century ago. For, although they were gradually admitted to a claim against legal assets (*h*), their claim was always, until the year 1869, postponed until the claims of specialty creditors had been fully satisfied. At length, however, by the Administration of Estates Act of that year, usually called Hinde Palmer's Act, the equitable rule of equality was fully adopted, and all substantial preference of specialty creditors abolished (*i*).

(*f*) Ss. 10 (3), 12 (3).

(*g*) 3 W. & M. c. 14, s. 3 (repealed, but substantially re-enacted, by the Debts Recovery Act, 1830.)

(*h*) E.g., by the 47 Geo. 3, st. 2, c. 74 (traders), and the Administration of Estates Act, 1833.

(*i*) Until the passing of the Land Transfer Act, 1897, specialty creditors had the slight *procedural* advantage of being alone entitled to sue the heir or devisee directly. (*Re Hedgely*, (1886) 34 Ch. D. 379.)

Except, however, in the case of copyholds, the claim of the creditors will now, in the case of death after the 31st December, 1897, be directed against the personal representatives of the deceased, in whom his real, as well as his personal, assets will vest (*k*); and it will be only in the event of premature distribution of the estate, that any question of the direct liability of the heir or devisee can be raised. In any case, of course, this liability will be limited, as before, to the *assets* derived by the heir or devisee from the deceased; and the Land Transfer Act, 1897 (*l*), expressly provides that, as between the real and personal representatives of the deceased, the liability of their respective assets to satisfy the claims against the estate shall remain unaffected by its provisions. Estates tail are not, of course, responsible for the debts of a deceased tenant-in-tail, other than the Crown debts mentioned in the Act of 1541 (*m*).

(*k*) Land Transfer Act, 1897, s. 1.
(*l*) S. 2 (3).
(*m*) 33 Hen. 8, c. 39, s. 50; *Anderson's Case*, (1597) 7 Rep. 21 a.

CHAPTER XII.

OF TITLE BY ESCHEAT.

[ESCHEAT signifies chance or accident; and the term is applied to the chance or case of the owner of an estate in fee simple dying without having disposed of it, and leaving no lawful heir behind him to take it by descent. In this case, by the doctrine of escheat, the estate results back, by a kind of reversion, to the original grantor or lord of the fee (*n*). And here it is to be observed, that the land so escheating afterwards follows the lord's seignory, as being a fruit thereof. If therefore the lord was entitled to the seignory by purchase, the land escheated will descend to his heirs general; but if by descent, it will be inheritable only by such of his heirs as are capable of inheriting the seignory (*o*).

In order to complete his title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or commencing an action to recover them. If he fail to do so, or do any act that amounts to an implied waiver of the escheat, as by accepting rent of a stranger who usurps the possession, his title is barred (*p*).

The law of escheat is founded upon this single principle, that the inheritance of land held in fee simple having failed, it must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom (or by those whose estate he hath) it was given.

Escheats have been frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis;* the

(*n*) Co. Litt. 13 a.
(*o*) Inheritance Act, 1833, s. 1.
(*p*) Co. Litt. 268 b.

[one sort, if the purchaser should actually die without an heir, the other, if his blood be attainted (*q*); for, as the law until recently stood, a person attainted could have no lawful heir. Owing, however, to recent changes, escheat *propter delictum tenentis* is now almost unknown; and a very few words will suffice to describe it.

I. Escheats *propter defectum sanguinis*. By the law, as it now stands, an escheat of this kind can only take place on the total failure of the heirs of the person last entitled to the estate, *i.e.*, the person on whose decease the descent has occurred. For, although the Inheritance Act, 1833, made the *purchaser* the stock of descent, and, consequently, allowed escheat on failure of *his* heirs, yet, as we have seen, the Law of Property Amendment Act, 1859, provides that, on failure of the heirs of the purchaser, the person last entitled shall be deemed the purchaser for the purposes of descent. If he were actually the purchaser, the statute of 1859 is, of course, inoperative. But if he were not, then all *his* heirs will be entitled to succeed before the lord claiming by escheat. Sometimes, however, though there are actual, or natural heirs of the person who is treated as the stock of descent, they are not "lawful" in the strict sense, and cannot, therefore, inherit the estate, or prevent an escheat.

The persons who are thus under disability to take as heirs may be classed as follows:—

1. [A *monster*, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir (*r*).

2. *Bastards* are incapable of being heirs. Bastards, by our law, are such children as are not born of lawful wedlock, or within a competent time after its determination.

(*q*) Co. Litt. 13 a, 92 b. (*r*) *Ibid.* 7 b.

[Such are held to be *nullius filii*, the sons of nobody, the maxim of the law being, "*qui ex damnato coitu* "*nascuntur, inter liberos non computantur*" (*s*). And bastards, being thus the sons of nobody, have in them no inheritable blood, consequently, none of the blood of the purchaser, real or fictitious. And therefore, if there be no other claimant, the land shall escheat to the lord.

By the Roman Law, which has been adopted in many modern States, the subsequent marriage of a man with the woman by whom he had had a bastard, made the latter legitimate. But this rule has never been adopted in England. And, although the foreign rule is recognized in English Courts, in certain cases, for purposes of succession to personal property (*t*), it is a well-established doctrine of English law, that no English land can be *inherited* by any person not born, or at least conceived, in wedlock (*u*).

There is indeed one instance in which our law has shown bastards some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvil expresses it in his Latin, *filius mulieratus* (*x*); the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigné*, and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it till his death, and dies seised thereof, and the inheritance descends to his issue; in this case, the *mulier puisné* and all other heirs (though minors, married women, &c.) are totally barred of their right (*y*). And this—1. As a punishment on the *mulier*

(*s*) *Ibid.* 8 a.

(*t*) *Re Goodman's Trusts*, (1881) 17 Ch. D. 266.

(*u*) *Birtwhistle* v. *Vardill*, (1840) 7 Cl. & F. 895.

(*x*) L. 7, ch. 1.

(*y*) Litt. ss. 399, 400.

[for his negligence, in not entering during the bastard's life and evicting him. 2. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother. And therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom), yet paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. And these rules as to the *bastard eigné* applied also when a man had two daughters, the elder of whom was a bastard, and they both entered peaceably as co-parceners (*z*). But if the mother was never married to the father, the *bastard eigné* had no title at all (*a*).

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For all collateral kindred consists in being derived from the same common ancestor; and as a bastard has no legal ancestors, he can have no collateral kindred. And therefore if a bastard purchase land, and die owner thereof without issue, and intestate, the land shall escheat to the lord of the fee.]

3. Aliens also were, till recently, incapable of taking by descent (*b*). And therefore, if a man left no other relations but aliens, his land escheated to the lord. Moreover, aliens could not *hold* real estate by purchase; for land purchased by an alien could be at once claimed by the Crown, on office found (*c*). And as they could neither hold by purchase nor take by inheritance, they could have no heirs, because they had nothing for an heir to inherit.

[Moreover, at one time, aliens could not be the *channels*

(*z*) Co. Litt. 244 a. This passage about the *bastard eigné* has been retained, out of respect for former editors. But there is grave doubt whether it is law at the present day. Descent being no longer traced from the person last seised, the claims of the bastard's issue appear to be untenable.—E. J.)

(*a*) Litt. s. 400.

(*b*) Co. Litt. 8 a.

(*c*) *Ibid.* 2 b.

[of descent. For if an alien came into England, and there had issue two sons, and one of them purchased land and died, his brother could not be his heir (*d*), even though the father were dead. For the *commune vinculum*, namely, the father, having no inheritable blood in him, could communicate none to his sons. This rule, however, was effectually altered by a statute of the year 1700 (*e*), which enacted that all persons, natural-born subjects of the king, might inherit and make their title by descent from any of their ancestors, although such ancestors, by, from, through, or under whom they derived their pedigrees, were born out of the king's allegiance.] And such is still the law as to tracing descent in cases to which the Naturalization Act, 1870, is inapplicable. But the matter is now of small importance; for, by the second section of that Act, it has been provided, with regard to all titles accruing *after* the 14th May, 1870, that real property of every description may be taken, acquired, held and disposed of by an alien, in the same manner in all respects as by a natural-born British subject, and that a title thereto may be derived through, from, or in succession to an alien, as if he had been a natural-born British subject (*f*).

II. Escheats *propter delictum tenentis*. This happened where, by attainder, the blood of the person attainted became, in the eye of the law, so corrupted as to be no longer inheritable.

The old law with respect to corruption of blood upon attainder, and the consequent escheat of the lands and tenements of the offender to the lord of the fee, is now of little practical importance; and its history may be very briefly summarised.

(*d*) Co. Litt. 8 a.

(*e*) 11 Will. 3, c. 6.

(*f*) 33 & 34 Vict. c. 14, s. 2. (Presumably, in cases not falling under the Act of 1870, the alien ancestor would still himself be barred, notwithstanding the rules of the Inheritance Act, 1833.—E. J.)

[According to that law, by the commission of treason or other felony, the blood of the tenant was corrupted and stained, and the original donation of the feud was thereby determined. And, accordingly, upon the thorough demonstration of the tenant's guilt by legal attainder, the feudal covenant and mutual bond of fealty were held to be broken, the estate instantly fell back from the offender to the lord of the fee, and the inheritable quality of the tenant's blood was extinguished and blotted out for ever.

This escheat to the *lord* by reason of his tenant's attainder, must be distinguished from forfeiture to the *Crown*. For, independently of any escheat, the felon's lands and tenements (to the extent of his interest therein) were, by force of the attainder, immediately forfeited to the Crown. But, after a severe struggle between the Crown and the mesne lords, it was agreed that, in the case of ordinary felons, the Crown's right of forfeiture should operate only for a year and a day; after which the lord's right of escheat prevailed (*g*). In the case of a traitor, however, the Crown made good its claim to permanent forfeiture.

Forfeiture, moreover, extended only to estates which were vested in the offender at the time of his attainder; but escheat pursued the matter further. For, the blood of the tenant being, by the attainder, utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future. For example, if a father was seised in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life. But nothing would in such a case be forfeited to the king, for the son never had any interest in the land to forfeit (*h*).

(*g*) Magna Carta, (1225) c. 22. (*h*) Co. Litt. 13 a.

[On the other hand, where a new felony was created by Act of Parliament, and the Act provided (as was frequently the case) that the offence should not extend to corruption of blood, the lands of the felon would not escheat to his lord, though the profits of them would be forfeited to the king for a year and a day.

The consequences of corruption of blood could not be removed but by authority of Parliament. For, although the king might excuse the punishment of the offender, even the king could not defeat or abrogate the private right accrued by the attainder. He might remit the forfeiture, in which the interest of the Crown alone was concerned; but he could not wipe away the corruption of blood, so as to affect the right of escheat to the lord. If, therefore, a man had a son, and was attainted, and afterwards pardoned by the king, this son could never inherit to his father, or to his father's ancestors, because his paternal blood, being once corrupted by his father's attainder, must continue so. But if the son had been born *after* the pardon, he might have inherited; because (by the pardon) the father was made a new man, and might convey new inheritable blood to his after-born children (*i*).

The doctrine of corruption of blood on attainder, arising as it did from feudal principles, and perhaps extending further even than those principles warranted, gradually came to be regarded as a peculiar hardship; and therefore in most (if not in all) of the new felonies from time to time created by Act of Parliament since the reign of Henry the Eighth, it has been usual to declare, that they should not extend to any corruption of blood. During the last century, moreover, many statutes were passed with the object of mitigating the hardships of the doctrine.] These, however, were all practically superseded by the Forfeiture Act, 1870, which provides that no confession, verdict, inquest, conviction, or judgment for any

(*i*) *Ibid.*, 392 a.

treason or felony or *felo de se*, after the 4th day of July, 1870, is to cause any attainder or corruption of blood or any forfeiture or escheat (*k*). The Act provides that the property of a convict shall vest in an administrator to be appointed by the Crown. But in the case of a trustee or mortgagee becoming a convict within the meaning of the Act, it has now been provided by the Trustee Act, 1893 (*l*), that the legal estate shall remain in such convict, or survive to his co-trustee or co-trustees, or descend to his representative, as if he had not become a convict.

In cases where (under the former law) an escheat or forfeiture of the beneficial interest in lands actually took place, its consequences were often remitted, when the Crown was the party entitled to take the benefit; for the Crown was, by modern Acts of Parliament, frequently empowered to make grants for the purpose of restoring the lands to the family of the former beneficial owner (*m*). And now, by the Intestates Estates Act, 1884 (*n*), s. 6, this power in the Crown has been declared generally; and the mode of application to the Crown for a waiver of the forfeiture or escheat is also thereby prescribed.

(*k*) The Act preserves *in statu quo* the law of forfeiture consequent on *outlawry*; but inasmuch as outlawry in all *civil* proceedings has been abolished by the Civil Procedure Acts Repeal Act, 1879, the exception of outlawry can now only refer to *criminal* proceedings.

(*l*) 56 & 57 Vict. 53, s. 48.

(*m*) 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, st. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 4, c. 17.

(*n*) 47 & 48 Vict. c. 71.

CHAPTER XIII.

OF TITLE BY OCCUPANCY.

[OCCUPANCY is the taking of possession of things which belong to nobody. *Quod nullius est, id ratione naturali occupanti conceditur* (*o*). But title by occupancy, so far as it concerns real property (for of personal chattels we do not in this place speak), hath been confined by the laws of England within a very narrow compass, applying only to the single instance where a man was tenant *pur auter vie*, that is, had an estate granted to himself only (without mentioning his heirs), and died during the life of *cestui que vie*. In this case, he that could first enter on the land might, by right of *common occupancy*, have lawfully retained the possession so long as *cestui que vie* lived. This seems to have been a recurrence to first principles, and a calling in of the Law of Nature to ascertain the property of the land, thus left without a legal owner. For land granted to A. during the life of B., did not, on A.'s death during B.'s life, revert to the grantor; for the grantor had parted with all his interest so long as *cestui que vie* lived. And the land did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this. Neither did the land descend to the heirs of the grantee; for there were no words of inheritance in the grant. Nor did it vest in the executors of the grantee; for an estate of freehold could not pass to personal representatives. Belonging therefore to nobody, the law left it open to be seized and appropriated, under the name of an occupancy, by the first person that could

(*o*) Dig. 41, 1, 3.

[enter upon it during the life of *cestui que vie*. But if the estate *pur auter vie* had been granted to a man *and his heirs* during the life of *cestui que vie*, there could not then have been a title by common occupancy; but the heir of the grantee would succeed, and was called a *special* occupant.] And so the law continued until quite recently, the heir succeeding, in the absence of a will, by virtue of the original grant, and occupying the land during the residue of the estate granted, though subject, since the passing of the Administration of Estates Act, 1833, to the claims of the grantee's creditors. But now, it is presumed, estates *pur auter vie* will, even though there be a special occupant, pass to the personal representatives of the tenant on his decease (*p*).

The title by *common* occupancy has, however, virtually been abolished by the effect of three successive statutes. The first of these is the Statute of Frauds, in 1677, which provides (s. 12) that an *estate pur auter vie* shall be devisable in all cases, and that, if not devised, and there is no special occupant, it shall go to the personal representatives of the tenant, and be assets in their hands for payment of debts. The second is a statute of the year 1741 (*q*), which enacts that, if there is any surplus in the hands of such representatives after the payment of debts, it shall be distributed among the tenant's next-of-kin, like personalty. And the third is the Wills Act of 1837, by which it has been provided, that every estate *pur auter vie*, of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may be devised by will (*r*); that if no disposition by will be made of an estate *pur auter vie* of a freehold nature, it shall be chargeable in the hands of the heir (if it comes to him by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple; and that

(*p*) Land Transfer Act, 1897, s. 1 (1). Presumably, however, the beneficial interest will, in default of devise, still belong to the heir.

(*q*) 24 Geo. 2, c. 20, s. 9.

(*r*) 7 Will. 4 & 1 Vict. c. 26, s. 3.

in case there shall be no special occupant of an estate *pur auter vie*, of whatever tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and that it shall in every case be assets of the deceased to be applied and distributed in the same manner as personal estate (*s*).

Save in the case of the estate *pur auter vie* (now provided for by statute), it is difficult to mention any other instance wherein, by our law, there is not some owner of the land. [For in the case of a sole corporation, as the parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership subsisting in contemplation of law. And when the successor is appointed, his appointment has a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, where the tenant dies intestate, and no other owner of the lands is to be found in the common course of descent, there the law vests an ownership, as we have said, in the Crown, or a mesne lord, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in a river, or by the alluvion or dereliction of the sea; in these instances, the law of England assigns them an immediate owner. For Bracton tells us that, if a new island rise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is the proprietor of the nearest shore (*t*). But when the whole soil of the river is the freehold of one man,—as usually happens when a *several* fishery is claimed (*u*)—there it seems just

(*s*) Sect. 6.
(*t*) Bract. lib. 2, ch. 2.
(*u*) *Smith* v. *Kemp*, (1692) Salk. 637.

[that the eyots or little islands, arising in any part of the river, shall be the property of him who owneth the fishery and the soil. However, in case a new island rise in the *sea*, though the civil law gives it to the first occupant, yet ours gives it to the Crown. And as to lands gained from the sea, either by *alluvion* (*i.e.* by the washing up of sand and earth, so as in time to make *terra firma*), or by *dereliction*, as when the sea shrinks back below the usual watermark, in these cases the law is held to be, that if this gain be little by little, it shall go to the owner of the land adjoining. For *de minimis non curat lex*. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the Crown. For as the Crown is lord of the sea, and the owner of the soil while it is covered with water, it is but reasonable it should have the soil, when the water has left it dry (*x*). In the same manner, if a river, running between two lordships, by degrees gains upon the one and leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, his land will not be lost (*y*).]

Finally, it may be mentioned that, although the law of England does not formally recognize the acquisition of title to estates in land (in ordinary cases) by mere *occupation*, yet, in effect, the Real Property Limitation Acts passed in the last century produce this result. For, by the 34th section of the Act of 1833 (*z*), it is expressly provided that the *right and title* of the person whose claim has been barred by the operation of the statute, as well as his mere *remedy*, shall be extinguished at the determination of the period within which it might have been enforced. And, although the extinction of the title of one hostile claimant would not affect the rights of others

(*x*) Hale, *De Jure Maris*, cap. iv.
(*y*) *Hindson* v. *Ashby*, [1896] 1 Ch. 78.
(*z*) 3 & 4 Will. 4, c. 27.

who claim independently of him, yet, when all hostile claims are extinguished by lapse of time, it would seem difficult to deny that the actual occupant had obtained a title. And this is, at any rate, the view which has been taken by some eminent authorities (*a*).

(*a*) *Doe* v. *Summer*, (1845) 14 M. & W. 39; *Asher* v. *Whitlock*, (1865) L. R 1 Q. B. 1.

CHAPTER XIV.

OF TITLE BY FORFEITURE.

[FORFEITURE is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.] At one time the loss of lands by forfeiture must have been very frequent, and the subject is treated at considerable length in the old books. But, with changes in the law (*b*), it has now sunk into comparative unimportance, and may be disposed of under four heads:—1. Forfeiture by alienation for an unlawful purpose; 2. Forfeiture by alienation of particular tenants; 3. Forfeiture by wrongful disclaimer; and 4. Forfeiture by breach of express condition. Of these in their order (*c*).

1. Forfeiture by *alienation for an unlawful purpose*. Since the disability of aliens in the matter of land-owning was abolished by statute, the only important case which falls under this head is the case of alienation in *mortmain*. [Alienation in *mortmain* is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal (*d*). But these purchases having been chiefly made by religious houses, in consequence whereof the lands became inherent in one "dead hand" (*i.e.*, of the saint to whom the religious house was

(*b*) *e.g.*, Real Property Act, 1845, abolishing the tortious operation of a feoffment; Naturalization Act, 1870, enabling aliens to hold land; Forfeiture Act, 1870, abolishing forfeiture for attainder.

(*c*) Forfeiture incurred by neglect to present to, or simoniacal dealings in respect of, an ecclesiastical benefice, will be dealt with at a later stage. (See bk. iv., pt. ii. ch. 3.)

(*d*) Co Litt. 2 b.

[dedicated), this hath occasioned the general appellation of *mortmain* to be applied to such alienations, and the religious houses themselves to be principally considered in framing the Statutes of Mortmain.]

By the common law, any man might dispose of his lands to any other private man at his discretion, especially when the feudal restraints on alienation were worn away. Yet, in consequence of these, it has long been necessary for corporations to have a licence in mortmain from the Crown, to enable them to become the holders of lands. For as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats or other feudal profits, by the vesting of the lands in tenants who can never die. And besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no such licence was obtained, the king or other lord might enter on the lands so aliened in mortmain, as for a forfeiture.

Yet such was the ingenuity of the clergy, that, notwithstanding this fundamental principle, the religious houses obtained large possessions, whereby the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn, and lords were curtailed of their escheats, reliefs, and the like. And therefore, in order to prevent this, it was provided, by the second of King Henry the Third's great charters, and afterwards by that printed in our common statute books, that all such gifts should be void, and the lands forfeited to the lords of the fee (*e*).

But as this prohibition extended only to religious *houses* (*i.e.*, ecclesiastical corporations aggregate), bishops and other sole corporations were not included therein;

(*e*) Mag. Cart. Hen. 3, (1225) c. 36.

[and the ecclesiastical corporations aggregate found many means to creep out of this statute, by buying in lands that were holden of themselves as lords of the fee, and thereby evading the forfeiture, or by taking long leases for a thousand years or more. This produced the Statute *De Religiosis*, of 1279 (*f*), by which it was provided, that *no person* (religious or other) should buy, or sell, or receive under pretence of a gift or lease, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as for a forfeiture.

The statutes referred to extending, however, only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence. And thereupon judgment was given for the religious house, which then *recovered* the land upon a supposed prior title by sentence of law. And thus they had the honour of inventing those fictitious adjudications of right which afterwards, under the name of *common recoveries*, became the great assurances of the kingdom. But, upon this, the Statute of Westminster the Second (13 Edw. I.), c. 32, enacted, that in such cases a jury should try the true right of the demandants or plaintiffs to the land; and if the religious corporation was found to have it, they should still recover, but otherwise the land should be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter against tenants who set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of

(*f*) 7 Edw. 1, st. 2.

[the privileges of those religious and military orders. And so careful was this provident prince, that when the Statute *Quia Emptores* (18 Edw. I. c. 3) abolished sub-infeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorise alienation in mortmain.

The next evasion resorted to by the religious houses was the adoption of the new method of conveyance, (previously described (*g*)) by which the lands were granted, not to themselves directly, but to feoffees *to their use*, whereby they received the actual profits, without becoming entitled to the lands themselves, the seisin of the lands remaining in the feoffees. But even this device was checked by the Mortmain Act of 1391 (*h*), by which it was enacted, that Uses should be subject to the Statutes of Mortmain, and forfeitable like the lands themselves. This statute, which extended to all corporations, whether ecclesiastical or not, seems finally to have put a stop to evasions of the Mortmain Laws.

But, as regards all alienations to bodies corporate, it was always in the power of the Crown, by granting a *licence of mortmain*, to remit the forfeiture, so far as related to its own rights; though it could not affect the rights of the mesne lords. This prerogative was confirmed by statute of the year 1344 (*i*); and when, through the long operation of the Statute *Quia Emptores*, the rights of mesne lords had been reduced within a very small compass, it was declared, by an Act of the year 1696 (*k*), that the Crown for the future, at its own discretion, might grant licences to aliene or take in mortmain, *of whomsoever the tenements might be holden.*

At the time of the Reformation, moreover, it was deemed necessary to place impediments in the way of alienating lands for religious purposes, even though such

(*g*) *Ante*, bk. ii., pt. i., ch. 9.
(*h*) 15 Ric. 2, c. 5.
(*i*) 18 Edw. 3, st. 3, c. 3.
(*k*) 7 & 8 Will. 3, c. 37.

[alienations did not, strictly, violate the rule against mortmain, *e.g.*, because the lands were not vested in corporations. Such alienations were accordingly declared *void*, but not a cause of forfeiture, by a statute of the year 1531 (*l*). And, although this statute was afterwards construed to cover only gifts for *superstitious* purposes, the policy of restraining improvident gifts to charities was never lost sight of, and ultimately, by the so-called Mortmain Act of 1736 (*m*), it was enacted, that (in effect) all gifts by *will* for charitable purposes should be simply void; and that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or incumbered, in trust for, or for the benefit of, any *charitable* use whatsoever, unless by *deed* executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in Chancery within six calendar months after its execution, and unless such gift was made to take effect immediately, without power of revocation, or other clause or covenant for the benefit of the donor, or of those claiming under him. If these several conditions were not complied with, not only was the charitable use inoperative, but the conveyance itself was void to all intents and purposes.]

The law as to alienation in mortmain and as to gifts of lands for charitable purposes is now chiefly contained in the Mortmain and Charitable Uses Act, 1888 (*n*), whereby the former provisions regarding mortmain and charitable uses respectively have been consolidated, with some slight amendments, and all the earlier Acts have been repealed. And, first, as regards alienation in mortmain. Land may not (except with the licence of the Crown) be acquired by or on behalf of any corporation not authorized in that behalf by statute, under pain of forfeiture of such land to the Crown, subject to the rights of the mesne

(*l*) 23 Hen. 8, c. 10.
(*m*) 9 Geo. 2, c. 36.
(*n*) 51 & 52 Vict. c. 42.

lords (if any) (*o*); but the Crown may grant licences to aliene and to acquire in mortmain (*p*). And, second, as regards assurances for charitable uses. The assurance of land or of money to be laid out in the purchase of land (unless it be a registered disposition under the Land Transfer Act, 1875), must be by deed, with two witnesses (*q*), executed twelve calendar months before the death of the assuror, and enrolled in the Supreme Court (Central Office) within six calendar months of its execution, must take effect in possession immediately, and must be without any power of revocation or reservation other than of a peppercorn rent, or of mines or minerals, or of easements, or of building provisions, or (in the case of *bonâ fide* purchases) other than of a rent or rent-charge regarded as portion of the purchase-money payable. Stock to be laid out in land for charitable purposes must be transferred in the public books six calendar months before the death of the assuror (*r*). If these formalities are omitted, the attempted alienation is void; but it does not, like an alienation in mortmain, work a forfeiture. But assurances for the purposes of a public park, or of an elementary school house, or of a public museum, are to a certain extent excepted from both classes of provisions; and as regards such assurances, which may, in general, be either by deed or by will, it is only required that they shall be executed twelve calendar months before the assuror's death, and be enrolled with the Charity Commissioners six calendar months after the execution of the deed, or the death of the testator. But the area of the land given must not exceed one acre for a school-house, two acres for a museum, and twenty acres for a park. The Universities of Oxford, Cambridge, London, Durham, and the Victoria University, and their several colleges, and the colleges of Eton, Winchester, and Westminster,

(*o*) Sect. 1.
(*p*) Sect. 2.
(*q*) This requirement does not apply to copyholds. Sect. 4 (6).
(*r*) Sect. 4.

and Keble College, are wholly exempted from the charitable provisions of the Act (*s*).

The provisions of the Act of 1888 thus rendered it practically impossible to dispose of lands for charitable purposes by *will*, except in the special cases provided for by that Act. But a sudden change of policy manifested itself three years later, when, by the Mortmain Act, 1891 (*t*), it was further enacted, that land may be assured by *will* to a charitable use, subject to this, that the land must be sold within a year from the death of the testator, or within such extended time as shall be allowed either by the High Court or by the Charity Commissioners. If the land remains unsold after the time limited for the sale thereof, it is to vest in the official trustee of charity lands, thereafter to be sold as soon as may be under the order of the Charity Commissioners, for the benefit of the charity. The High Court or the Charity Commissioners may, however, being first satisfied that the land is wanted for actual occupation by the charity, authorize the permanent retention of the land. The Act of 1891 also provides, as regards money given by will to a charity, with a superadded direction to lay out such money in the purchase of land, that the gift shall be good, the superadded direction only being void (*u*); and money secured on land, or other personal estate arising from or connected with land, is no longer to be regarded as land within the meaning of the Mortmain Acts (*x*).

Finally, it is to be observed that, by the amending Act of 1892 (*y*), neither the mortmain nor the charitable uses provisions of the principal Act are to apply to the acquisition by a local authority of land for any purpose for which it is empowered by statute to acquire land; except that a voluntary gift of land by deed to such an authority must still be made by a conveyance executed twelve months before the donor's death.

(*s*) Sect. 7.
(*t*) 54 & 55 Vict. c. 73.
(*u*) Sect. 7.
(*x*) Sect. 3.
(*y*) 55 Vict. c. 11.

2. [Forfeiture by *the wrongful alienation of the tenants of particular estates.* At one time, if the tenant of a particular estate (*e.g.*, for life or for years) conveyed by a common law conveyance, such as a feoffment, fine, or recovery, a greater estate than the law entitled him to make, this wrongful conveyance on his part was a cause of forfeiture to the person in immediate remainder or reversion (*z*). As if tenant for his own life aliened by feoffment or fine for the life of another, or in fee or in tail, these being estates which either must or might last longer than his own, the creating them was deemed inconsistent with the nature of his interest, and was a forfeiture of his own particular estate, to him in remainder or reversion, who was entitled to enter immediately. But if a tenant in tail aliened a fee, this was a mere *discontinuance* of the estate tail (*a*), which the issue might afterwards avoid by the appropriate action; and therefore this wrongful alienation was no forfeiture. And no alienation by grant, bargain and sale, or other "innocent" conveyance, would work a forfeiture, even though it might devest the reversion (*b*).

The forfeiture which results from the wrongful alienation of a tenant for life or for years differs somewhat from the forfeiture which accrues upon the breach of a condition in deed, to which we shall refer later in this chapter; for in the latter case the reversioner is *in* as of his former seisin, and not only the estate of the particular tenant himself, but all interests derived out of that estate (even before the forfeiture), are defeated (*c*). But in the case of forfeiture upon wrongful alienation, all estates and charges lawfully created and made before the forfeiture continue good, the forfeiture merely operating as

(*z*) Co. Litt. 251.

(*a*) *Ibid.* 326 b.

(*b*) *Podger's Case*, (1612) 9 Rep. 106 b.

(*c*) Gilb. *Ten.* 200; Dyer, 344 a.; 4 Rep. 24 a.; Co. Litt. 234 a.

(It is exceedingly doubtful if this doctrine applies to any cases other than those in which possession is recovered by force of the express words of a statute.—E. J.)

[a voluntary surrender would do.] The whole subject, however, of forfeiture upon a wrongful alienation has now lost much of its importance. For fines and recoveries were abolished by the Fines and Recoveries Act, 1833; and, by the Real Property Act, 1845, it is provided, that a "feoffment made after 1st of October, 1845, shall not "have any tortious operation." But it would seem that the doctrine might still apply as between lord and copyholder.

3. [Forfeiture by *the wrongful disclaimer of a tenant.* Where the tenant of a particular estate (*e.g.*, a tenant for life or for years) neglects to render his lord the due services, and upon an action brought to recover them disclaims to hold of his lord, that disclaimer of tenure, in a court of record, is a forfeiture of the lands upon reasons most apparently feudal. And so likewise is it, if the particular tenant does any act which amounts to a *virtual* disclaimer; as if, being tenant for life only, he claims, in a court of record, to have a larger interest (*d*), or alleges the reversion to be in a stranger (*e*).] So where a tenant for years gave up possession of the demised premises to a third party who claimed paramount to the landlord, with intent to assist that party in setting up the adverse title, such behaviour was held to work a forfeiture of the lease (*f*). But a mere parol disclaimer does not avoid an estate (*g*).

4. Forfeiture by *breach of express condition.* The general principles of our law, on the subject of *estates upon condition*, have been explained in a previous chapter. Here it is only necessary to state that, in spite of certain equitable doctrines and statutory provisions, the general rule still holds, that, if a man accepts an estate determinable upon breach of a condition, and that condition is

(*d*) Co. Litt. 251 b.
(*e*) *Ibid.* 252 a.
(*f*) *Doe* v. *Flynn*, (1834) 4 Tyr. 619.
(*g*) *Doe* v. *Wells*, (1839) 10 A. & E. 427.

broken, he forfeits the estate. In the case of a term of years, the mere breach of the condition is said to devest the estate; but in the case of a freehold interest, an entry or action by the person entitled to enforce the forfeiture is necessary (*h*).

Owing to the abolition of the remedy of forfeiture by the writ of Waste (*i*), and the disappearance of tortious conveyances (*k*), it would seem that there can now be no forfeiture for breach of condition implied (*or condition in law*), except in the case of copyholds, and the case of disclaimer above noticed. At least this is so with regard to ordinary estates in land, though, doubtless, an office might still be deemed forfeited by neglect or misuser (*l*). But of forfeiture for breach of express condition (or *condition in deed*), there would seem to be no lack.

It is sometimes said, that Equity will relieve against forfeiture incurred through accident, fraud, or mistake; and no doubt there are many such cases, in which a Court of Equity has allowed a *locus penitentiæ* to a person who, under such circumstances, has incurred a forfeiture. But a recent decision of the Court of Appeal (*m*) has shewn that, at the present day, the tribunals, though willing to acknowledge the existence of that doctrine, are not inclined to allow its operation to be extended. In the case referred to, the owner of a valuable term of years had sublet part of the premises to a perfectly unobjectionable tenant. By the terms of the original lease, the lessor's consent should have been asked. Through a mistake of the solicitor's clerk, who prepared the under-lease, the necessary consent was not requested. It was admitted that the head lessor would have been obliged to give the consent had it been demanded, and that he had incurred

(*h*) Co. Litt. 218 b.; approved in *Doe* v. *Flynn*, *ubi sup.*

(*i*) Real Property Limitation Act, 1833, s. 6.

(*k*) Fines and Recoveries Act, 1833; Real Property Act, 1845, s. 4.

(*l*) Co. Litt. 233.

(*m*) *Barrow* v. *Isaacs & Son*, [1891] 1 Q. B. 417.

no loss by the sub-letting. Yet he was held entitled to enforce a forfeiture of the term.

There are, however, cases in which a real protection against careless or unimportant breaches of conditions has been provided by statute. In the first place, Courts of Equity have long granted relief against forfeiture for non-payment of rent; and this jurisdiction, after being recognized and defined by the Landlord and Tenant Act, 1730, was extended to the Common Law tribunals by the Common Law Procedure Act, 1860. The precise law on the subject appears to be difficult to ascertain; but the better opinion is, that relief against forfeiture for non-payment of rent can only be granted within six months after the landlord has recovered possession of the premises, and, of course, only on payment in full of rent, interest, and costs (*n*).

But, second, a far more sweeping protection has been afforded, for breaches other than those occasioned by non-payment of rent, by the provisions of the recent Conveyancing Acts (*o*). These provisions will be explained in greater detail in a subsequent chapter (*p*). Here it is sufficient to say that, by virtue of them, a lessee has, in almost every case (*q*), an opportunity of redeeming his estate by making good any damage done to his lessor by an act which would, but for the statutory provisions, work a forfeiture; and that the lessor is unable to enforce his claim to recover the premises until he has afforded the lessee such an opportunity. These provisions apply to all leases, whenever made, and cannot be excluded by agreement of the parties (*r*). Inasmuch as it is the almost invariable practice for conveyancers to turn every one of the numerous lessee's covenants in a lease into a condition,

(*n*) See Hood and Challis, *Conveyancing and Settled Land Acts*, (5th ed.) pp. 63–4.

(*o*) Conveyancing Act, 1881, s. 14; 1892, ss. 2 and 3.

(*p*) *Post*, bk. ii., pt. i., ch. xxiv.

(*q*) The exceptions are stated in the Act of 1881, s. 14 (6), as modified by the Act of 1892, ss. 2 and 3.

(*r*) Conveyancing Act, 1881, s. 14 (9).

by means of the "proviso for re-entry," the protection afforded by the Conveyancing Acts is of the greatest value. It seems to be somewhat doubtful, whether this protection extends to leases of freehold interests, *e.g.* for lives; but the terms used would seem to be wide enough to cover such cases, and, probably, this view would be taken also of the powers of the Court to relieve against forfeiture for non-payment of rent.

CHAPTER XV.

OF TITLE BY ALIENATION.

THE most usual title to real estates is that by *alienation*, or conveyance by the mutual consent of the parties, whether effected upon a sale or upon any other occasion.

[By the feudal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord, lest thereby a feeble or suspicious tenant should be substituted to perform the feudal services, instead of one on whose abilities and fidelity the lord could depend. And as the feudatory could not aliene the feud in his lifetime, so neither could he by will defeat the succession, nor even alter the course of it. Nor could he aliene, even with the consent of the lord, unless he also obtained the consent of his own next heir (*s*). Therefore, it was very usual in antient feoffments to express, that the alienation was made with consent of the heirs of the feoffor; and sometimes for the heir-apparent himself to join with the feoffor in the conveyance (*t*). And, on the other hand, as the feudal obligation was regarded as reciprocal, the lord could not aliene or transfer his seignory without the consent of the tenant; for it was esteemed unreasonable to subject the feudatory to a new superior without his own approbation (*u*). This consent of the tenant to the lord's alienation was expressed by what was called *attorning*, or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all lessees for life or years, so

(*s*) Co. Litt. 94; Wright, *Ten.* 169.

(*t*) Madox, *Formul. Angl.* Nos. 316, 319, 427.

(*u*) Gilb. *Ten.* 83.

[that upon the purchase of a reversion on any lease for life or years if the tenant for life or years refused to attorn to the purchaser, the grant was in most cases void or at least incomplete (*x*) ; which was also an additional clog upon alienations.

But by degrees this feudal severity wore off. In the first place, by a law of King Henry the First a man was allowed to sell and dispose of lands which he himself had *purchased*, as contra-distinguished from those he had acquired by *descent* (*y*). But he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene the paternal estate (*z*). Afterwards a man seems to have been at liberty to part with all his own acquisitions, provided he had previously purchased them to him and his *assigns* by name (*a*) ; and he was also then allowed to part with one-fourth of the inheritance of his ancestors, without the consent of his heirs (*b*). But by the great charter of Henry the Third, no alienation was permitted of any part of the land, unless sufficient was left to answer the services due to the superior lord (*c*), which sufficiency was probably interpreted to be one-half (*d*).

As regards alienation *inter vivos*, all restrictions thereon were removed by the statute of *Quia Emptores* (18 Edw. I.), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion, subject only to the provision that all conveyances of the fee simple should be to hold, not of the grantor, but of the lord of whom the grantor himself had

(*x*) Gilb. *Ten.* 90, 91.

(*y*) "*Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.*" —Wilkins, *Leg. Ang.-Sax.* LL. Hen. 1, c. 70 ; Feud. 1, 2, t. 39.

(*z*) "*Si quæstum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet ; sed non totum quæstum, quia non potest filium suum hæredem exhæredare.*"—Glanv. l. 7, ch. 1.

(*a*) Mirr. ch. 1, s. 3.

(*b*) *Ibid.*

(*c*) 9 Hen. 3, (1225) c. 32.

(*d*) Dalrymple, *Feuds*, 95.

[held. Subsequently by the statute 1 Edw. III. st. 2, c. 12, passed in the year 1327, the king's tenants *in capite* also were permitted to aliene on paying a fine to the king (*e*). By the temporary statutes, 7 Hen. VII. c. 2 (A.D. 1491), and 3 Hen. VIII. c. 4 (A.D. 1511), persons attending the king in his wars were allowed to aliene their lands without fine. And lastly, fines on alienation were entirely abolished, in the case of all lands of freehold tenure, by the Act for the Abolition of Feudal Tenures, passed in 1660 (12 Car. II. c. 24).]

As regards alienation by will, the ancient restrictions were partially taken off by the old Statute of Wills, 1540 (32 Hen. VIII. c. 1), which enabled tenants to devise the entirety of their *socage* lands, and two-thirds of their lands held by knight's service, and were entirely abolished as an effect of the Act for the Abolition of Military Tenures, which converted all the lands in the kingdom held by knight's service into socage.

Lastly, by the 4 & 5 Anne, c. 3 (sometimes cited as 4 Anne, c. 16), s. 9, attornment ceased to be necessary to complete any voluntary grant or conveyance. But, of course, attornment is still necessary in the case of lands being taken upon an *elegit*, or otherwise under a judgment obtained *in invitum* (*f*); and when the court appoints a receiver, it invariably directs that the tenants shall attorn to the receiver, that proceeding also being a proceeding *in invitum*. And we may also here observe, that by the Distress for Rent Act, 1737, the fraudulent attornment of the tenant to a stranger, to the prejudice of his landlord, is rendered wholly inoperative (*g*).

The result of the several relaxations above referred to has been to liberate realty from all the feudal restraints on alienation. Subject to very few exceptions, all estates in land are now freely transferable. This is usually so,

(*e*) 2 Inst. 67.

(*f*) *Harris* v. *Booker*, (1837) 4 Bing. N. C. 99.

(*g*) See also Landlord and Tenant Act, 1730; *Brown* v. *Storey*, (1840) 1 Man. & Gr. *in notis*, p. 129.

even when the estate is granted subject to an express condition that the grantee shall not aliene; or that his estate is to determine on his attempting to aliene. Conditions of the latter kind may, under certain circumstances, be annexed to life estates and leases for years; but any clause or condition intended to prohibit a tenant in fee simple (*h*) or a tenant in fee tail (*i*) from alienating the fee simple is void as repugnant to the nature of the estate, or contrary to the policy of the law. And, as regards tenants for life, when they are tenants of settled lands within the Settled Land Acts, any restriction on the exercise of the powers of alienation given to them by those Acts (*k*) over the settled lands is, by section 51 of the Settled Land Act, 1882, expressly declared to be invalid.

Estates at will or by sufferance, however, are not alienable. But besides these, there were, at the common law, some few other interests which were incapable of transfer. For a man who, having been ousted of the possession of his land by the wrongful act of a stranger, had a *right of entry* only, could not, in general, have aliened that right to another (*l*); nor could a person entitled to a contingent or executory interest or a possibility coupled with an interest have alienated it. But, by section 3 of the Wills Act, 1837 (1 Vict. c. 26), all these rights and interests may now be alienated by will; and by section 6 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), they may now be alienated by deed (*m*).

[We shall now proceed to inquire, first, *who* may aliene, and to *whom*, reserving for a subsequent chapter the consideration of the question *how* he may aliene. And in considering the question, who may aliene, and to

(*h*) Co. Litt. 222 b, 223 a; *Rosher* v. *Rosher*, (1884) 26 Ch. D. 801; *Kelly* v. *Elliot*, [1896] 2 Ch. 353; *Re Trustees of Hollis' Hospital and Hague's Contract*, [1899] 2 Ch. 541.

(*i*) *In re Machu*, (1882) 21 Ch. D. 838; *Dugdale* v. *Dugdale*, (1888) 38 Ch. D. 176.

(*k*) See *infra*, p. 455.

(*l*) *Kennedy* v. *Lyell*, (1885) 15 Q. B. D. 491.

(*m*) *Pemberton* v. *Barnes*, [1899] 1 Ch. 544.

[whom, or, in other words, who is capable of conveying and who of accepting such conveyance, we have to consider rather the incapacity than the capacity of the parties, all persons being *primâ facie* capable both of making and of accepting conveyances.

It is clear that *attainted* persons, though they might purchase lands, were at one period of our law disabled from holding them (*n*), the lands so purchased being subject to escheat and forfeiture, as already explained. Attainted persons were also incapable, from the time of the offence committed, of conveying away their lands, so as to affect the Crown or the mesne lord, because such conveyance might tend to defeat the Crown of its forfeiture, or the lord of his escheat (*o*). As regards the present state of the law, these positions require to be considered in connection with the modern statutes affecting escheat and forfeiture, which have been noticed in a former chapter.]

In like manner, *corporations*, religious or other, may purchase lands ; yet, unless they have a licence to hold in mortmain, they cannot in general retain such purchase, but it shall be forfeited to the lord of the fee, unless, of course, in the excepted cases mentioned in the previous chapter. And, as regards the power of *alienation* by corporations, they might in general, at the common law, make estates at their pleasure of any lands and tenements they held in their corporate right, ecclesiastical corporations *sole* being, however, required to obtain certain consents, in order to make their alienations binding on their successors (*p*). But the powers of alienation belonging to ecclesiastical corporations are now regulated by a variety of Acts, of which an account will be given in that chapter of this work which treats of the endowments and provisions of the Church (*q*) ; and the

(*n*) *Bullock* v. *Dodds*, (1818) 2 B. & Ald. 275.

(*o*) Co. Litt. 42 b ; *Doe* v. *Pritchard*, (1834) 5 B. & Ad. 782.

(*p*) *Colchester* v. *Lowton*, (1813 1 Ves. & B. 226.

(*q*) *Vide post*, bk. iv. pt. ii. ch. iii.

powers of alienation belonging to *lay* corporations (being colleges or hospitals) are also now regulated by statute. As regards such lay corporations as are *municipal* corporations, viz., incorporated towns, their powers of alienation were restricted by the Municipal Reform Act of 1835 (5 & 6 Will. IV. c. 76), as amended by the 6 & 7 Will. IV. c. 104, whereby they were disabled from selling or mortgaging their lands, and, in general, also from demising them for any term exceeding thirty-one years, except in pursuance of some agreement entered into by the body corporate before the 5th June, 1835, or else with the approbation of the lords of the Treasury, or of any three of them. The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which now regulates municipal corporations, substantially re-enacts these restrictions. It provides, by sects. 108, 109, that the corporation may not, without the approval of the Treasury, sell, mortgage, or alienate any corporate property, unless pursuant to some enabling Act of Parliament; or, without such approval, lease the corporate property, save for a term not exceeding, in the general case, thirty-one years or, in exceptional cases, seventy-five years; but with such approval, it may make any sale, mortgage, lease, or other alienation of the corporate property on terms approved by the Treasury, including (by sect. 111) leases for 999 years for workmen's dwellings. By the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 72), the consent of the Local Government Board has now, in all these cases, been substituted for the consent of the Treasury. An exception similar to that made by the Municipal Reform Act, 1835, is also made by sect. 110 of the Municipal Corporations Act, 1882, which enacts that, under any agreement for renewal in force on the 5th June, 1835, and binding on the corporation, or when there has been an established usage of renewal, the town council may grant leases in renewal of existing leases on the old accustomed terms, or on such other terms as the corporation might have done if the Act had not been passed.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 64 (3)), and the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 8 (2)), the consent of the Local Government Board is in like manner required for the alienation of lands vested in the county councils and other local authorities constituted under those Acts.

Where the grantee does not give value, the conveyance of an *insane person*, when it is not made during a lucid interval, is void, excepting that if it be made by feoffment it is not absolutely *void*, but, owing to the solemnity of the livery, is voidable only. Where, however, the grantee does give value, then the conveyance is good if the grantee was not aware that the grantor was insane; and, even if he was aware of this, the conveyance is only voidable (*r*). The practical difference between a void and a voidable transaction is, that the former is a mere nullity, and therefore incapable of confirmation, while the latter may be either avoided or confirmed *ex post facto* (*s*). When the conveyance is voidable, it may be avoided during the lunatic's life by the person legally authorized to act for him, or by the insane person himself should he regain his senses, or, after the lunatic's death, by his heir, or any other person interested. An insane person is competent to *purchase* (*t*), though he cannot be compelled to *retain* what he purchases; the transaction, if found to be disadvantageous to him, being liable to subsequent avoidance on the ground of his insanity (*u*).

The conveyances and purchases of *infants*,—that is, of persons under twenty-one,—are in general not void, but voidable, and may be avoided either by themselves in their lifetime, or by their representatives after their death (*x*); but if a voidable purchase has not been avoided by an infant within a reasonable time after his

(*r*) *Imperial Loan Co., Ltd.* v. *Stone*, [1892] 1 Q. B. 599.

(*s*) *Whelpdale's Case*, (1603) 5 Rep. 119; 2 Inst. 483; Moor, 43.

(*t*) Co. Litt. 3 b.

(*u*) *Beavan* v. *M'Donnell*, (1853) 9 Exch. 309; 10 Exch. 184.

(*x*) Moor, 43; *Gibbs* v. *Merrill*, (1811) 3 Taunt. 307.

coming of age, then on his death it cannot afterwards be impeached by his representatives, on the ground of its having been effected during infancy (*y*). And in this we are to be understood as speaking of *conveyances* strictly so called; for many of the *contracts* of an infant are now, by the Infants' Relief Act, 1874, absolutely void, and are not confirmable by the infant, even upon his attaining full age (*z*). Finally, lands held in gavelkind may, by the custom of Kent, be conveyed by feoffment by an infant on attaining the age of fifteen, and by the Infant Settlement Act, 1855, an infant not under twenty, if a male, or not under seventeen if a female, may, with the consent of the Chancery Division of the High Court, make a valid settlement of his or her property in contemplation of marriage.

[A *married woman*, both as regards her purchases and her alienations, was very peculiarly situated at the common law. She might *purchase* an estate without the consent of her husband; and the conveyance to her was good during the coverture, till the husband avoided it by some act declaring his dissent (*a*). And, though he did nothing to avoid it, or even if he actually consented to it, the married woman herself might, after the death of her husband, have disagreed to the same; nay, even her heirs might have disagreed to it after her, if she died before her husband, or if during her widowhood she had done nothing to express her ratification of the transaction (*b*). On the other hand, the alienation of a married woman was absolutely void, unless made in such particular method as the law specifically appointed for that purpose (*c*).] This was formerly by fine or recovery; but, by the Fines and Recoveries Act, 1833, it was by deed executed with the concurrence of her husband and

(*y*) 2 Inst. 483; 5 Rep. 119.

(*z*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62). See *post*, bk. ii., pt. ii., ch. v., sect. 1.

(*a*) Co. Litt. 3 a.

(*b*) *Ibid.*

(*c*) 2 Bl. Com. 293.

separately acknowledged by her, that is to say, by deed acknowledged (*d*). And, by the Real Property Act, 1845, s. 7, a *disclaimer* by a married woman is likewise by deed acknowledged.

[The case of an *alien* was also peculiar. For, though he has always been able to acquire property of any description by purchase, yet after purchase he could not, at one time, *hold* any land, save only in case he was an alien friend and a merchant, when he might hold a lease for years of a house for convenience of merchandise. All other purchases, when found by an inquest of office, were immediately forfeited to the king, whether they had, in the meantime, been conveyed away by the alien or not (*e*); also, by the 32 Hen. VIII. c. 16, s. 13, a lease made to an alien *artificer* was absolutely void (*f*).] Latterly, however, by the 7 & 8 Vict. c. 66, aliens might take and hold leases of lands for twenty-one years, provided they were for the purposes of trade or residence; and now, by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien may not only acquire and hold real and personal property of every description in the same manner in all respects as a natural freeborn British subject, but may also as freely dispose of the same.

And in connection with the capacity or incapacity to purchase, it may be fit here to advert to the principle of our law, that no person can be compelled to take an estate by purchase against his will. If, therefore, land be conveyed *in invitum*, the effect of the conveyance may always be avoided, by the execution of a deed of disclaimer on the part of the dissentient alienee (*g*). It was, on the other hand, a doctrine of the common law that the heir could not disclaim an estate which came to him by descent. Whether this doctrine has been implicitly abolished by the Land Transfer Act, 1897 (60 & 61 Vict.

(*d*) 3 & 4 Will. 4, c. 74, ss. 77, 9, 91.

(*e*) *Anon.*, 4 Leon. 84.

(*f*) Co. Litt. 2 b.

(*g*) *Beybie* v. *Crook*. (1835) 2 Bing. N. C. 70.

c. 65, s. 1), which vests an intestate's real estate in his administrator, and gives the heir no legal title to it until the administrator conveys it to him, it is difficult to say.

A devisee of distinct estates, where the devises are for his own benefit absolutely, may disclaim one or more of the devises without disclaiming the others (*h*). But, as regards trust estates, there seems to be now some question, whether the trustee can disclaim one estate without disclaiming the others (*i*), which partial disclaimer used to be a very common thing, more especially where the trust estates comprised lands of copyhold tenure (*k*).

(*h*) *Freke* v. *Calmady*, (1886) 32 Ch. D. 408 ; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511.

(*i*) *In re Lord and Fullerton*, [1896] 1 Ch. 228.

(*k*) *Lord Wellesley* v. *Withers*, (1855) 4 El. & Bl. 750.

CHAPTER XVI.

OF DEEDS.

[BEFORE considering the divers modes of conveyance by which alienations, by the mutual consent of the parties, may be effected,—that is to say, before considering the different species of *deeds*,—it is convenient to consider *deeds* themselves generally. And in treating of deeds, we shall consider, first, what a deed is; secondly, its requisites; thirdly, how it may be avoided; and lastly, the general rules for its construction.

I. First, what a deed is.—A deed is a writing sealed and delivered by the parties. It is sometimes called a charter (*carta*), from its materials (*l*), although more usually, and when applied to the transactions of private subjects, almost exclusively, it is called "a deed," *factum*, par excellence, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property. Therefore a man, at any rate where the deed is based on valuable consideration (*m*), shall always be *estopped* by his own deed, that is, shall not be permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*n*).] And for the same reason, when an engagement has been made by way of simple contract, that is, without deed, and afterwards the very same engagement is made between the same parties by deed, the first contract is merged in the second (*o*). Further, a

(*l*) Co. Litt. by Harg. 9 b, n. (1).

(*m*) *Lovett* v. *Lovett*, [1898] 1 Ch. 82.

(*n*) Plowd. 434; Co. Litt. 260, 352 a; *Low* v. *Bouverie*, [1891] 3 Ch. 82.

(*o*) *Sharpe* v. *Gibbs*, (1864) 16 C. B. (N.S.) 527.

contract by deed is not capable of being contradicted or explained by any other contract or declaration between the same parties, which is not itself also under seal (*p*).

[If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and the deed so made is called an *indenture*, because the parts used formerly to be cut or indented in acute angles (*instar dentium*, or serrated) on the top or side, to tally or correspond the one with the other or others (*q*). At one time, too, when deeds were more concise than they are at present, and only two parts were required, it was usual to write both parts on the same piece of parchment, with some word (or letters of the alphabet) written between them, through which the parchment was cut, either in a straight or in an indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists (*r*), and with us *chirographa*, or handwritings (*s*)—*cirographum*, or *cyrographum*, being usually the word which was divided in the cutting;] and in the indentures of a fine, this custom continued to be observed until the abolition of that species of conveyance. But the practice of cutting through any word, (or letters of the alphabet,) fell into disuse; and by the Real Property Act, 1845, s. 5, a deed, purporting to be an indenture, is to have the effect of an indenture though not actually indented. [When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are termed *counterparts* (*t*); though of late it has become most frequent for all the parties to execute every part, which renders them all originals. A deed made

(*p*) *Gwynne* v. *Dary*, (1840) 1 Man. & G. 857.

(*q*) Litt. s. 371; Co. Litt. 476, 229 a, n. (1).

(*r*) Lyndew. l. 1, t. 10, ch. 1.

(*s*) Mirrour, ch. 2, s. 27; Co. Litt. by Harg. 143 b, n. (4).

(*t*) *Burchell* v. *Clark*, (1877) 2 C. P. D. 88.

[by one party only, is called a *deed-poll* (*u*), such a deed having (in old times) been *polled* (*i.e.*, shaved even), and not indented.

II. Secondly, as to the requisites of a deed.—Of these, the first is, that there be persons able to contract and to be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter, to be contracted for: and all these must be expressed by sufficient names (*x*). Thus, in every grant there must be a grantor, a grantee, and a thing granted; and in every lease, a lessor, a lessee, and a thing leased. And the second requisite is, that the deed must be *written* or *printed*, either upon paper or on parchment; for if on stone, board, linen, leather, or the like, it is no deed (*y*). A deed must be duly stamped; else it cannot, in general, be given in evidence (*z*).

And it is a third requisite, that the matter of the deed be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement of the parties. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds (*a*). As these

(*u*) Mirrour, ch. 2, s. 27; Litt. ss. 371, 372.

(*x*) Co. Litt. 35 b.

(*y*) *Ibid.* 229 a; F. N. B. 122.

(*z*) The principal Act relating to the stamps on deeds is the Stamp Act, 1891 (54 & 55 Vict. c. 39); and by the 14th section of that Act, it is provided, that on the production of an instrument chargeable with any duty, as evidence in any court of civil judicature, if the instrument be one which may legally be stamped after execution, it may be received in evidence, saving all just exceptions on other grounds, on payment of the amount of the unpaid duty, and of the penalty payable by law on stamping after execution, and of a further sum of 1*l.* And the penalty is fixed, by the 15th section of the Act, at the sum of 10*l.*, together with interest at 5*l.* per cent. on the amount of the unpaid duty, where this exceeds 10*l.* There is also the Stamp Act, 1888 (51 Vict. c. 8), by which (sect. 18) it is provided, that the person by that Act made liable to pay the duty, if he neglects to pay same, forfeits 10*l.*, and in addition pays the above-mentioned penalty of 10*l.* and interest, and a further penalty equal to the amount of the stamp duty.

(*a*) Co. Litt. 6 a; 225 a.

[formal parts, however, have been settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity. Therefore, they shall be here mentioned in their usual order (*b*).

1. The *premises* set forth the number and names of the parties, with their additions or titles;] and, in the case of an indenture, the deed is always formally described as made *inter partes*, that is, as made between such an one *of the one part*, and such another *of the other part*. As to which, this distinction was formerly established, that one named as a party to an indenture could not covenant therein with a stranger (or person not named as a party), nor could the latter take an estate under the deed, except by way of remainder (*c*), though a stranger might covenant with one who was a party, binding himself by executing the deed (*d*). But, by the Real Property Act, 1845, s. 5, an immediate estate and interest in any hereditaments, and the benefit of a condition or covenant respecting any hereditaments, may be taken, though the taker be not named a party to the deed. The premises also contain the *recitals*, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded, and they set down the consideration upon which the deed is made; and then follows the certainty of the grantor and grantee, and of the thing granted. And, as regards the description of the thing granted, a conveyance of any *land* will suffice to pass also the structures or buildings thereon, as well as the

(*b*) When the transaction is a purchase, the purchaser prepares the draft of the conveyance; and when that draft is approved by the vendor, the purchaser also prepares an engrossment of the deed properly stamped, and sees to its due execution. But when the transaction is a lease, the draft and engrossment, properly stamped, of the lease are usually prepared not by the lessee but by the lessor, although at the lessee's expense.

(*c*) *Reeves* v. *Watts*, (1866) L. R., 1 Q. B. 412.

(*d*) Co. Litt. 259 b; *Berkeley* v. *Hardy*, (1826) 5 B. & C. 355.

mines thereunder; but a conveyance of certain specified land, or of a certain house, (even adding the words *with the appurtenances*,) will not pass other land not specified, —although it may have been usually occupied together with the property conveyed (*e*); unless, indeed, the land not specified should consist of the orchard, garden, or curtilage of the house conveyed, in which case it would pass under a grant of the house with the *appurtenances*, or even under a grant of the house simply (*f*).

[2, 3. Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate or interest is granted by the deed; and when that is performed (and sometimes it is performed) in the *premises*, then the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to, the estate granted in the premises (*g*). As if the premises describe a grant to be "to A. and the heirs of his body," *habendum*, "to him and his heirs for ever," or *vice versâ*, here A. has an estate tail and a fee simple expectant thereon (*h*). But had the grant been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would have been utterly void, for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it (*i*). The *tenendum* ("and to hold") is now of very little use. It was sometimes used formerly to express the tenure by which the estate was to be holden; viz. "*tenendum per servitium militare in burgagio, in libero socagio*," *&c.* But all these tenures having been now reduced to free and common socage, the tenure is never specified, excepting in the case of copyhold or

(*e*) *Re Portal and Lamb*, (1885) 30 Ch. D. 50.

(*f*) Co. Litt. by Harg. 5 b, n. (1), 121 b; *Hinchliffe* v. *Kinnoul*, (1838), 5 Bing. N. C. 1, 25.

(*g*) *Shaw* v. *Kay*, (1848) 1 Exch. 412.

(*h*) Co. Litt. 21 a; 2 Roll. Rep. 19, 23; Cro. Jac. 476; *Goodtitle* v. *Gibbs*, (1826) 5 B. & C. 709.

(*i*) *Baldwin's Case*, (1589) 2 Rep. 23; *Earl of Rutland's Case*, (1609) 8 Rep. 56.

[customary-hold lands. Before the statute of *Quia Emptores* (18 Edw. I.), the *tenendum* was also sometimes used to denote the lord of whom the land was holden. But, that statute directing all future purchasers of the fee simple to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi*. But as this expressed nothing more than the statute had already provided for, it gradually grew out of use (*k*).

4. Next follows the *reddendum*, or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted (*l*), as "rendering for the same, yearly, the sum of 10*s*.," or a peppercorn, or two days' ploughing, or the like. Under the pure feudal system, this return or rent consisted, in chivalry, principally of military services, and, in villenage, of the most slavish offices; but in socage, it has usually consisted of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to grantors, or some or one of them, and not to any stranger to the deed; but if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee (*m*).

5. Next follows (when the grant so intends) the *condition*, or clause of contingency, on the happening of which the estate granted is to be defeated, — as "provided always, that if the mortgagor shall pay the "mortgagee 500*l*. upon such a day, the whole estate "granted shall determine," and the like.

(*k*) Madox, *Formul.* (*passim.*).

(*l*) *Burchell* v. *Clark*, (1876) 2 C. P. D. 88.

(*m*) *Browning* v. *Beston*, (1556) Plowd. 132; *Whitlock's Case*, (1609) 8 Rep. 71.

[6. As to the clause of *warranty* formerly inserted in conveyances, but now fallen into disuse (*n*). By this clause the grantor did for himself and his heirs "warrant" to the grantee the estate conveyed. The origin of this practice seems to have been in the feudal constitution, whereby, if the vassal's title to enjoy the feud was disputed, he might "vouch," or call the lord or donor to warrant his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*o*). And so by the antient law, if a man enfeoffed another in fee, the law annexed a warranty to the grant (*p*). So upon a partition or exchange of lands of inheritance, if either party or his heirs were evicted of his share, the other and his heirs were bound to warranty (*q*); also, upon a gift in tail or lease for life rendering rent, where the feudal verb *dedi* (or give) was used in the grant, the donor or lessor and his heirs were bound to warrant the title (*r*). Now, however, by sect. 4 of the Real Property Act, 1845, no warranty is to be implied upon an exchange or partition. And in other forms of alienation bearing no sort of analogy to the gift of a feud, no warranty whatsoever was ever held to be *implied;* and therefore it became necessary, in such cases, to add an *express* clause of warranty in order to bind the grantor and his heirs.

Where the express clause was in fact superadded, it was held that this warranty not only bound the warrantor himself to protect the title of the warrantee, but that it also bound the heir of the warrantor to the same effect, provided he had other sufficient lands by descent from the warranting ancestor (*s*). And this was so, whether the warranty was *lineal*, or *collateral* to the title of the land—*lineal* warranty being where the heir derived (or

(*n*) Co. Litt. by Butl. 365 a, n. (1), 373 b, n. (2).
(*o*) *Feud.* l. 2, t. 8 and 25.
(*p*) Co. Litt. 384 a.
(*q*) *Ibid.* 174, 384 a.
(*r*) *Ibid.* 384 b.
(*s*) Co. Litt. 102 a.

[might by possibility have derived) his title to the land warranted, either from or through the ancestor who made the warranty (as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger); and *collateral* warranty being where the heir's title to the land neither was (nor could have been) derived from the warranting ancestor (*t*). And though the heir was only bound to insure the title of the grantee on his ancestor's warranty, provided he had assets, yet (whether assets descended or not) he was perpetually debarred from claiming the land *himself*. But warranties being found to produce, in individual instances, inconvenient results, divers statutes were from time to time passed to restrain their force (*u*); and the practice itself, of inserting any clause of warranty in deeds, fell by degrees into disuse.

7. A deed usually contains also *covenants*, which are clauses of agreement contained in a deed, whereby either party stipulates for the truth of certain facts, or binds himself to do or to abstain from doing something, or to give something to the other. Thus, the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; or the grantee may covenant to pay his rent, or to keep the premises in repair, or not to use them in a certain manner, and the like.] By the common law, the use of the words "demise," "grant," or "give," raised an *implied* covenant on the part of the grantor for quiet enjoyment, &c., except so far as it might be controlled by some express covenant in the same deed (*x*). But (so far at least as regards the words "grant" and "give") the law on this head is now altered, it having been enacted by the Real Property Act,

(*t*) Litt. ss. 703, 705, 706, 707.

(*u*) 6 Edw. 1, c. 3; 11 Hen. 7, c. 20; 4 & 5 Ann. c. 3, s. 21; 3 & 4 Will. 4, c. 27, s. 39; c. 74, s. 14.

(*x*) Cro. Eliz. 674; *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; *Budd-Scott* v. *Daniel*, [1902] 2 K. B. 351.

1845, s. 4, that neither of those words in any deed executed after the 1st October, 1845, should imply any covenant, except so far as they might, by force of any *Act of Parliament*, do so (*y*). (See Lands Clauses Consolidation Act, 1845, s. 132.)

A covenant gives to the covenantee and his representatives, in case of its breach, a right of action for damages against the covenantor and his representatives; and in a deed of *conveyance*, a covenant for title to the land conveyed will also, in general, *run with the land*,—that is to say, not only the original parties or their representatives, but each successive owner of the land will be entitled to its benefit, or liable (as the case may be) to its obligation (*z*). It is consequently usual, so far as covenants for title are concerned, for the person who sells land which he himself has bought, to covenant only against his own acts; or if he did not acquire the land by purchase, then to extend the covenant as far back as to the acts of the last buyer, but no further, that being a sufficient security to the vendee, where all the former vendors have entered into a similar covenant, because all these engagements run with the land, and consequently operate for his protection (*a*). In the case of a mortgage, however, the mortgagor's covenants for title are not so limited, but are absolute. This distinction between the covenants of a vendor and the covenants of a mortgagor is preserved in the Conveyancing Act, 1881 (*b*), s. 7, by the effect of which, if the parties are expressed to convey respectively "as beneficial owner," the respective covenants for title are implied (*c*); and the benefit of all such implied covenants runs with the land conveyed (s. 7 (6)).

8. [Lastly, comes the *conclusion*, which mentions the

(*y*) 8 & 9 Vict. c. 18, s. 132.

(*z*) Shep. *Touch.* 161; *Spencer's Case*, (1583) 5 Rep. 16 a; *Tulk* v. *Moxhay*, (1848) 2 Ph. 774; *Austerberry* v. *Oldham* (*Corporation*), (1885) 29 Ch. D. 750.

(*a*) *Browning* v. *Wright*, (1799) 2 Bos. & Pul. 22.

(*b*) 44 & 45 Vict. c. 41.

(*c*) *Page* v. *Midland Rail. Co.*, [1894] 1 Ch. 11.

[execution and date of the deed, or the time of its being given or executed; but a deed is good, although it mention no date, or have a false or impossible date, as the 30th of February, provided the real day of its execution can be proved (*d*).

The fourth requisite to a deed is the *reading* of the deed. This reading is necessary, when either of the parties desires it, but not otherwise; and if it be not done, or if it be read falsely, on request, the deed is void at least for so much as is misrecited (*e*), unless, indeed, it be so read by collusion on purpose to make it void, in which latter case it will bind the fraudulent party (*f*).

The fifth requisite to a deed is, that the party whose deed it is, should *seal* it (*g*), and it is usual now to sign it also. Seals were in use among the Jews (*h*); and, in the civil law, seals were required, on the part of the witnesses at least, at the attestation of every testament (*i*). But in the times of our Saxon ancestors, they were not much in use in England (*k*). For the method of the Saxons was for such as could write, to subscribe their names, and for all parties, whether they could write or not, to affix the sign of the cross, a custom which the illiterate keep up to this day. In like manner and for the same unsurmountable reason the Normans (a brave but illiterate nation), at their first settlement in France, used the practice of sealing only, without writing their names; and hence the charter of

(*d*) Co. Litt. 46 b; *Styles* v. *Wardle*, (1825) 4 B. & C. 908.

(*e*) *Rex* v. *Longman*, (1833) 1 Nev. & M. 576.

(*f*) *Manser's Case*, (1608) 2 Rep. 3; *Pigot's Case*, (1615) 11 Rep. 27.

(*g*) Merely placing the finger on a seal or wafer already attached, is equivalent to sealing, and is the usual practice (Shep. *Touch.* 57); and there is indeed no necessity that there should be either wax or wafer, if only an impression be made on the parchment or paper, with the *intent* of sealing it. (*National Provincial Bank of England* v. *Jackson*, (1886) 33 Ch. D. 1.)

(*h*) 1 Kings, ch. 21; Daniel, ch. 6; Esther, ch. 8; Jer. ch. 32.

(*i*) Inst. 2, 10, 2 and 3.

(*k*) Palgrave, *Eng. Con.* ccxv.; Co. Litt. 7 a.

[Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, is, in fact, witnessed only by his seal (*l*). At the Norman Conquest, the Normans, bringing over into this kingdom their own fashions, introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross. And in the reign of Edward the First, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*n*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, or, indeed, into any other use till about the reign of Richard the First. And it eventually came to be the law with us, that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds,—"*sealed* and delivered,"—continues to this day. But the more usual form is "*signed*, sealed, and delivered," and that, because of a doubt suggested as to whether the Statute of Frauds (29 Car. II. c. 3), which requires writing to every "*contract or sale*" of lands, does not require signing also to every conveyance of lands,—and so to every deed (*o*).

The sixth requisite to a deed is, that it be *delivered* by the party himself or by his certain attorney; which therefore is also expressed in the attestation, "sealed and *delivered*." In practice, both sealing and delivering is held to be performed by placing the finger on the seal or wafer, at the same time uttering the words, "I deliver this as my act and deed" (*p*). A deed takes effect only from this delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another

(*l*) Lamb. *Archeion*, 51.

(*n*) Stat. Exon. (14 Edw. 1).

(*o*) 1 Shep. *Touch.* by Preston, 56; *Cooch* v. *Goodman*, (1841) 2 Q. B. 580, 597.

(*p*) *Watkins* v. *Nash*, (1875) L. R. 20 Eq. 262.

[person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (*q*). Moreover, a delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some condition be performed on the part of the grantee. In the latter case, it is delivered, not as a *deed*, but as an *escrow* (*r*); that is, as a scroll or writing, which is not to take effect as a deed till the condition be performed; and then it is a deed to all intents and purposes, and operates as from the date of the sealing and delivery (*s*).

The last requisite to a valid deed is that it must in general be duly *attested*, that is, must show that it was executed by the party *in the presence of a witness or witnesses*,—though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the old feudal *brevia testata*, which were written memorandums introduced to perpetuate the tenor of the conveyance and investiture (*t*), when grants by parol only became the foundation of frequent dispute and uncertainty. To this end the names of all the persons who attended as witnesses, and who heard the deed read, were inserted by the clerk or scribe in a sort of memorandum, thus:— "*hiis testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*" (*u*). This, like all other solemn transactions, was originally done only *coram paribus* (*x*), and frequently when assembled in the court baron, hundred court, or old county court, which was then expressed in the attestation, *teste comitatu, hundredo, &c.* (*y*). Afterwards the attestation of other witnesses was allowed, the trial, in case of a dispute, being still reserved to the

(*q*) Perk. § 130.

(*r*) *Lloyd's Bank, Limited* v. *Bullock*, [1896] 2 Ch. 192; *Re MacCallum*, [1901] 1 Ch. 146. Co. Litt. 36 a.

(*s*) *Graham* v. *Graham*, (1791) 1 Ves. jun. 272.

(*t*) *Feud.* l. 1. t. 4.

(*u*) Co. Litt. 6 a.

(*x*) *Feud.* l. 2, t. 32.

(*y*) Spelm. *Gloss.* 228; Madox, *Formul.* Nos. 21, 322, 660.

[*pares*; with whom the witnesses (if more than one) were associated and joined in the verdict (*z*), till that also was abrogated by the statute of York, 12 Edw. II. st. 1, c. 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters, particularly *Magna Carta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner (*a*). Nor was the clause of *hiis testibus* entirely discontinued in royal grants till the reign of Henry the Eighth (*b*); and that was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general. And therefore, *ever since that time*, the witnesses have usually subscribed their attestations, either at the bottom or on the back of the deed (*c*).

III. How a deed may be avoided, or rendered of no effect.—And, first, if there be wanting any of the essential requisites before mentioned,—viz. 1, Proper parties, and a proper subject matter; 2, Writing on paper or parchment; 3, Sufficient and legal words, properly disposed; 4, Reading (if desired) before the execution; 5, Sealing, and, in some cases, signing also; and 6, Delivery,—the instrument is a void deed *ab initio*. Second, it may (having been once duly executed as a deed) be avoided by matter *ex post facto:* as, 1. By rasure, interlining, or other alteration in any material part,—unless indeed a memorandum thereof, properly attested, be made, prior to the execution of the deed itself (*d*); 2. By breaking off or defacing the seal (*e*); 3. By delivering up the deed to be cancelled, that is, scored across in the form of lattice-work (*cancelli*), or otherwise defaced (*f*); 4. By the dis-

(*z*) Co. Litt. 6 b.
(*a*) 2 Inst. 77.
(*b*) Madox, *Dissert.* fol. 32.
(*c*) 2 Inst. 78.
(*d*) Com. Dig. *Fait* (F. 1); *Pigot's Case*, (1615) 11 Rep. 27; *Davidson* v. *Cooper*, (1845) 13 M. & W. 343.
(*e*) *Matthewson's Case*, (1597) 5 Rep. 23.
(*f*) Vin. Abr. *Faits* (X. 2, 3, 4); *Todd* v. *Emly*, (1843) 11 M. & W. 4.

[agreement of those whose concurrence is necessary in order for the deed to stand, as formerly of the husband, where a married woman was concerned; or of an infant or person under duress, when the infancy has ended or the duress been removed; and the like.]

Deeds are also in some cases avoided upon objections relating to the *consideration*, or want of consideration, for the deed. The consideration of a deed, may be either a *good* or a *valuable* one. A good consideration is such as blood or natural love and affection,—as where a man grants an estate to a near relation from motives of generosity, prudence, and natural duty; and a valuable consideration is such as money, marriage, or the like (*g*). Deeds made without any consideration whatever, and also those made for good, though not for valuable, consideration, are said to be *voluntary*. By force of the statute 27 Eliz., c. 4, passed in the year 1584, voluntary conveyances of lands used to be void as against subsequent *bonâ fide* purchasers for value from the donor of such lands; but since the Voluntary Conveyances Act, 1893, which came into force on the 29th June, 1893, conveyances of lands, if made without any actual fraudulent intent, are not now avoided by any such subsequent sale of the lands, *merely* on the ground that they are not based on valuable consideration. And again, by 13 Eliz. c. 5, voluntary conveyances, whether of lands or of goods, are void as against creditors, where the grantor is so indebted at the time he makes the conveyance that the effect of the conveyance will be to render him unable to pay his debts in full, in which case the Court will presume a fraudulent intention (*h*), or where an actual intention on the part of the grantor to defraud his creditors is shown (*i*). A deed is also liable to be impeached, if

(*g*) *Twyne's Case*, (1601) 3 Rep. 80 b; 2 Rol. Abr. 779; Palm. 214.

(*h*) *Spirett* v. *Willows*, (1863) 3 D. J. & S. 303; *Freeman* v. *Pope*, L. R. (1870) 9 Eq. 206.

(*i*) *In re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360.

founded on an immoral or illegal consideration, or if obtained by fraud (*k*). But, in general, the efficacy of a deed to bind the parties thereto will not be prevented by the mere *want* of consideration, deeds being in this respect distinguished from simple contracts, that is, contracts not under seal, to the validity of which latter some consideration is essential. A writing sealed and delivered as a deed, is supposed by the law to be made with due deliberation, and to express fully and absolutely the intention of the party by whom it is executed. He is therefore bound by its execution, whether he received a consideration for it or not (*l*). A party to a deed may be discharged from the obligations arising under it by a *release* by deed (*m*).

IV. The construction of deeds.—The rules relative to the construction of deeds are principally as follows:—

1. A deed is to be expounded according to the intention, where the intention is clear, rather than according to the precise words used; for "*verba intentioni debent inservire*," and "*qui hæret in literâ, hæret in cortice.*" [Therefore by the grant of a remainder, a reversion may well pass, and *è converso* (*n*); and upon the principle, that "*mala grammatica non vitiat chartam*," neither false English nor bad Latin will destroy a deed (*o*).]

2. To explain an ambiguity in the language of a deed, no evidence *dehors* the deed itself is admissible (*p*), where the doubt arises merely from the failure of the parties to express their own meaning in proper terms. For if the law allowed the difficulty in such a case to be removed by extraneous evidence, it would introduce inconvenient laxity into the structure of deeds in general. But it

(*k*) *Collins* v. *Blantern*, (1767) 2 Wils. 341.

(*l*) Bac. *Read. Uses*, p. 79; *Hall* v. *Hall*, (1873) L. R. 8 Ch. App. 430

(*m*) *West* v. *Blakeway*, (1841) 2 Man. & Gr. 729.

(*n*) Hob. 27.

(*o*) *Osborn's Case*, (1614) 10 Rep. 130 a.

(*p*) Bac. *Max. Reg.* 23.

is necessary to distinguish between *patent* and *latent* ambiguities (*q*), the first being where the doubt arises upon the face of the instrument itself, and to these the rule applies; and the second being where the doubt is introduced by the existence of a fact not apparent on the face of the deed, and to these the rule has no application. The reason for this distinction seems to be, that where the ambiguity itself is produced by circumstances extraneous to the deed, its explanation must of necessity be sought for through the same medium; and so also, and for the same reason, evidence of usage *dehors* the deed is admissible for its due construction (*r*).

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains; *e.g.*, where general words follow upon an enumeration of particular things, they are to receive, in general, their full ordinary meaning, and are not to be restricted upon any principle of an *ejusdem generis* construction (*s*).

4. [The construction should be *favourable*, and such that "*res magis valeat quam pereat*" (*t*). Therefore, where the words will bear two senses, the one agreeable to and the other contrary to law, that sense shall be preferred which is agreeable to the law (*u*); *e.g.*, if tenant in tail grants a lease by the common law to have and to hold during life generally, it shall be construed to be a lease for the lessor's own life only, for that stands within the common law, and not for the life of the lessee, which is beyond his common law power to grant.]

5. When any thing is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id*

(*q*) *Ibid.*

(*r*) *Doe d. Hiscocks* v. *Hiscocks*, (1839) 5 M. & W. 363. Tudor's Leading Cas. in Real Property, p. 489. *Re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75.

(*s*) *Anderson* v. *Anderson*, [1895] 1 Q. B. 749.

(*t*) Plowd. 156; Shep. *Touch.* 82, 83.

(*u*) Co. Litt. 42 a.

sine quo res ipsa haberi non potest" (*x*). Thus, if a man conveys a piece of ground in the midst of his estate, a right of way to come to it, over the land not conveyed, will also pass to the grantee.

6. [If there be two clauses in a deed so totally repugnant to each other that they cannot stand together, the first shall be received, and the latter rejected (*y*), the opposite rule being applicable in the case of wills (*z*).]

7. Ambiguous words shall be taken most strongly against the grantor; "*verba fortius accipiuntur contra proferentem*" (*a*). But this rule does not apply to a grant by the Crown, at the suit of the grantee (*b*); also, the rule is never to be resorted to or relied upon, but where all other rules of exposition fail.

(*x*) Shep. *Touch.* 89; *Liford's Case*, (1615) 11 Rep. 52; *Hinchliffe* v. *Kinnoul*, (1838) 5 Bing. N. C. 1.

(*y*) *Doe* v. *Leicester*, (1809) 2 Taunt. 109; *Re Bywater, Bywater* v. *Clarke*, (1881) 18 Ch. D. 17.

(*z*) Co. Litt. 112 b; Plowd. 541.

(*a*) Bac. *Max. Reg.* 3; *Neill* v. *Duke of Devonshire*, (1882) L. R. 8 App. Cas. 135.

(*b*) Bac. *Max. Reg.* 3.

CHAPTER XVII.

OF ORDINARY CONVEYANCES—AND FIRST, OF THOSE AT THE COMMON LAW.

In the earlier times, and indeed down to the reign of Henry the Eighth, the chief distinction between conveyances was this, that they were either by matter of *record* or by matter *in pais*. Those which were *in pais* were conveyances of the ordinary class transacted between two or more persons *in pais* (*i.e.*, in the country), according to the old common law, and upon the spot; while on the other hand, those which were matter of *record* were (as the name denotes) effected by assurances in the superior courts of justice. But in and subsequent to the reign just mentioned, various Acts of Parliament have been passed, the effect of which has been to introduce from time to time new classes of conveyances, deriving their force and authority from the particular statutes. In discussing the general object of conveyances, it is necessary to keep these distinctions in view, and for this purpose to sub-divide conveyances into, First, Conveyances at *common law*; Second, Conveyances *by statute law*; and, Third, Conveyances by matter of record.

First, *Conveyances at Common Law.* The chief of these is the *Feoffment.* Feoffment was for ages the only method of conveying the freehold of land in possession; and we shall proceed now to give some account of its nature and properties, although it has of late fallen, in great measure, into disuse, having been almost entirely supplanted in fact by more modern forms of conveyance.

[A feoffment, then, is no other than the antient feudal donation, the aptest word of feoffment being "*do*," *give*,

[or "*dedi*," *have given* (*c*); and the feoffment is still governed by the same feudal rules, the old rule, "*tenor est qui legem dat feudo*," which was applicable to the feudal grant, being applicable also to the feoffment (*d*). And therefore, as in pure feudal donations, the lord, from whom the feud moved, must have expressly limited and declared the continuance or quantity of the estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit*"; so if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee or feoffee hath barely an estate for life (*e*).

But by the mere words of donation the feoffment was by no means perfected, there remaining a very material ceremony to be performed, called *livery of seisin*, without which the transaction could not operate as a feoffment (*f*). This livery of seisin is no other than the pure feudal investiture, or delivery of the *corporal* possession of the land or tenement, which was held absolutely necessary to complete the donation. "*Nam feudum sine investiturâ nullo modo constitui potuit*" (*g*); and an estate was then only perfect in our law when, as the author of Fleta expresses it, "*fit juris et seisinæ conjunctio*" (*h*).] And in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required even to this day to vest the property completely in the new proprietor, who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and institution, but not the *jus in re*, or complete and full right, until induction, *i.e.*, acquisition of corporal possession (*i*).

[The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in

(*c*) Co. Litt. 9 a.
(*d*) Wright, *Ten.* 21.
(*e*) Co. Litt. 42 a.
(*f*) Litt. s. 70.
(*g*) Wright, *Ten.* 37.
(*h*) L. 3, ch. 15, s. 5.
(*i*) Decretal. l. 3, t. 4, ch. 40.

[many cases antiently allowed. For example, we find in the book of Ruth that among the Jews, a man plucked off his shoe and gave it to his neighbour (*k*); and among the antient Goths and Swedes, the seller of land cast a clod into the extended cloak of the buyer, or delivered him a wand (*l*). With our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands (*m*); and even to this day, the conveyance of a copyhold estate is usually effected by (or accompanied with) the seller's delivery of a rod or verge to the lord or his steward, who re-delivers the same to the purchaser.]

Conveyances *in writing* were an improvement on this primitive mode of transfer; and since the Statute of Frauds (29 Car. II. c. 3), s. 1, a feoffment has not been effectual unless evidenced by writing, though the transaction derives its legal force from the livery, and not from the written instrument (*n*); and now by the Real Property Act, 1845, s. 5, a feoffment made after the 1st October, 1845, other than a feoffment made under a custom by an infant, will be void at law unless evidenced *by deed*. But livery of seisin is even yet required to every valid feoffment.

[Livery of seisin may be either "in deed" or "in law." Livery in *deed* is, where the feoffor, or his attorney for the purpose, together with the feoffee, or his attorney, come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment on which the livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee (all other persons being out of the ground) a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it

(*k*) Ruth, ch. iv., v. 7.
(*l*) Stiernhook, *de Jure Sueon.* l. 2, ch. 4.
(*m*) Hickes, *Dissert. Epistolar.* 85.
(*n*) Co. Litt. 48 a.

[be of a house, the feoffor must take the ring or latch of the door (the house being quite empty of people), and deliver it to the feoffee in the same form, and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others (*o*). In either of these cases it is prudent and usual to indorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it, together with the names of the witnesses.

Livery in *law* is where the same is not made on the land, but in sight of it only, the feoffor saying to the feoffee, "I give you *yonder* land, enter and take possession"; and if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise.] By the antient law, indeed, if the feoffee dared not enter through fear of his life or bodily harm, his *continual claim*—made yearly in due form—would have sufficed without an entry (*p*); but now, by the Real Property Limitation Act, 1833, s. 11, no right of entry or action is preserved by *continual claim*. Livery in law cannot be given by attorney, nor yet can it be accepted by attorney, but only by the parties themselves (*q*).

[By feoffment, not only a fee simple may be conveyed, but an estate tail or an estate for life, these being all estates of freehold. But the *term* "feoffment" is considered as importing more properly a conveyance of the *fee simple*; while the conveyance of an *estate tail* is more technically called a *gift*; and that of an estate for life, a *demise* or *lease* (*r*).]

Up to a recent period the feoffment was distinguished from other conveyances by the following peculiarity, namely, that when made by a person in actual possession, it would always have the effect of passing to the feoffee a freehold, either by right or by wrong; for it was a

(*o*) Co. Litt. 48 a; West, *Symb.* 251.

(*p*) Co. Litt. 48 b; 2 Inst. 483.

(*q*) Co. Litt. 52 b.

(*r*) Litt. s. 59; Co. Litt. 9 a.

delivery of the actual seisin, that is, of the actual possession, as for an estate of freehold, in fee, in tail, or for life. If then the feoffor was himself lawfully seised to the full extent of the estate that he conveyed, a freehold of that extent would pass as of right; but if he was not lawfully seised, or not lawfully seised to that extent, a freehold of that extent would still pass, though a freehold by *wrong* (*s*). And when by such means, or by any other, a wrongful or tortious freehold was created, the effect was, that the person lawfully entitled to the freehold in possession was *disseised*; and if there was anyone entitled in reversion or remainder, such reversion or remainder was *displaced* or *divested*, the party being in each case put to his *right of entry*, that is to say, being obliged to enter, and eject the wrong-doer, in order to revest his own estate (*t*). And when the tortious feoffment was by a tenant in tail in possession, the effect was a *discontinuance*, which deprived both the issue and the remainderman or reversioner even of their right of entry, leaving them nothing but a right of action (*u*) But all this doctrine, *so far as regards the operation of a feoffment by wrong*, is now abolished by the Real Property Act, 1845, s. 4, which provides that "a feoffment made "after the 1st October, 1845, shall not have any *tortious* "operation."

II. The second mode of Conveyance by the Common Law is the *Grant*. A grant is effected by mere deed, without livery of seisin, the deed containing words expressive of the intention to convey; and the appropriate words are "*dedi et concessi*," "have given and granted," but any others of the like import will suffice (*x*). [A grant was the regular method, by the common law, of trasferring estates in expectancy (that is, reversions and

(*s*) *Fermor's Case*, (1602) 3 Rep. 77; Co. Litt. by Butl. 330 b, n. (1); 2 Sand. *Us.* pp. 18, 20.

(*t*) Co. Litt. 251 a.

(*u*) Co. Litt. 327 b.

(*x*) 2 Sand. *Us.* 47.

[remainders) in corporeal hereditaments (*y*); and the grant was appropriate also to the transfer (for whatever interest) of hereditaments purely incorporeal, such as advowsons, commons, rents, and the like, of which we are to treat hereafter. For it obviously results from the nature both of things incorporeal, and of corporeal things in expectancy, that no livery can be made of them,—not of the first, because they are not capable of possession, nor of the last, because the possession is in the particular tenant, and not in the grantor. For which reason they were formerly said to *lie in grant*, while corporeal hereditaments in possession were said to *lie in livery* (*z*); and as the latter passed by force of the livery of seisin, so the former passed by force of the deed.] But the conveyance by grant is now made applicable to all kinds of hereditaments; for, by the Real Property Act, 1845, s. 2, it is enacted, that, "after the "1st October, 1845, all corporeal tenements and heredita- "ments shall, as regards the conveyance of the immediate "freehold thereof, be deemed to lie in grant as well as in "livery." And, indeed, the use of the word *grant* is no longer necessary to convey real estate, and the word *convey* is now regarded as a sufficient equivalent in most cases (*a*).

III. [The third mode of Conveyance by the Common Law is the *Lease*. A lease is a conveyance by which a man grants lands or tenements (usually with the reservation of a rent) to another, for life, for years, or at will (*b*); and the estate so granted must be an estate short of the lessor's own estate in the lands (*c*). For if it be to the full extent of his estate, it is then properly an "assignment," and no lease.

A lease for *years* may be granted *in futuro* (*d*); but a lease for life, being for a freehold interest, could not be

(*y*) Co. Litt. 172 a, 332 a, b.
(*z*) 2 Rep. 31 b.
(*a*) Conveyancing Act, 1881, s. 49.
(*b*) Litt. s. 58.
(*c*) Co. Litt. 43 b; and Bac. Abr. *Leases and Terms of Years.*
(*d*) Co. Litt. 47 a.

[constituted by the common law without livery of seisin, and therefore could only be granted by feoffment (*e*), which implied an immediate commencement of the estate. No writing was formerly essential to the efficacy of any lease, unless, indeed, of an incorporeal hereditament (*f*); but by the Statute of Frauds (29 Car. II. c. 3), ss. 1, 2, all leases, with the exception of those not exceeding three years, and with a rent of not less than two-thirds of the improved annual value, must have been put into writing and signed by the lessor or his agent lawfully authorized in writing;] and, by the Real Property Act, 1845 (sect. 3), a lease, required by law to be in writing, of any tenements or hereditaments, made after the 1st October, 1845, will be void at law unless made *by deed* (*g*). [Moreover, the lease, even when created by deed, will not vest in the lessee a complete estate, until he has made *entry* on the land demised; and in the meantime he takes but an *interesse termini*. But where the lease is for years only, and is granted to take effect in possession at some future time, the lessee has of course no right to enter until that future time has arrived.]

It is important to distinguish leases *in futuro* from mere *agreements to let;* for an intending lessor may, without using such words as actually to divest himself of any interest, present or future, simply engage to grant a lease at a future period. And as no interest in the meantime passes, this will be a mere agreement, and no lease (*h*); but with respect to such agreements, the Statute of Frauds, s. 4, requires that, even where the term agreed for is less than three years, they shall be in writing (*i*).

[The usual words of operation in a lease are "demise, grant, and to farm let"—*demisi concessi et ad firmam*

(*e*) Litt. s. 59.

(*f*) *Rex* v. *Marquis of Salisbury*, (1838) 8 A. & E. 716.

(*g*) *Hand* v. *Hall*, (1877) 2 Ex. D. 355; and see *Parker* v. *Taswell*, (1858) 27 L. J. Ch. 812.

(*h*) *Rollason* v. *Leon*, (1862) 7 H. & N. 73.

(*i*) *Edge* v. *Strafford*, (1833) 1 Tyrw. 293.

[*tradidi* (*k*). For *farm* or *feorme* is an old Saxon word signifying provisions (*l*); and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions—in corn, in poultry, and the like,—till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme; though at present, by a gradual departure from the original sense, the word farm is brought to signify the very land so held upon farm or rent. Neither the words "to farm let," however, nor any of the others above specified, are necessary to effect a demise; any expressions sufficiently indicating the intention of one of the parties to divest himself of the possession, for a determinate period, in favour of the other, being clearly sufficient to constitute a lease (*m*).]

With reference to the covenants contained in a lease, we may here observe, that it results from what has been before stated, as to such as *run with the land*, that the lessee is liable not only to the original landlord or reversioner, but, in case of the grant of the reversion, then to the grantee also, for the future performance of all such covenants contained in the lease, on the part of the lessee; and is entitled, on the other hand, to enforce against the grantee, as well as the original landlord, the future performance of all such as are contained in the lease, on the part of the lessor. In order to improve the landlord's security, the lease usually contains also a proviso that, on breach of any of the covenants by the tenant, the landlord shall be at liberty to *re-enter*, and to resume possession of the premises as if no lease had been made; and this proviso constitutes, in case of a breach of covenant by the tenant, a most advantageous addition

(*k*) Co. Litt. 45 b.

(*l*) Spelm. *Gloss.* 229. (This derivation is exceedingly doubtful. —E. J.)

(*m*) Co. Litt. 45 b. See *Baynes & Co.* v. *Lloyd & Sons*, [1895] 1 Q. B. 820.

to the landlord's remedies, which would otherwise be confined to a right of action for damages on the covenant. But landlords now pursue their remedies under this proviso, subject to (and first complying with) the provisions in this behalf contained in the Conveyancing Act, 1881, hereinafter more particularly dealt with.

IV. [The fourth mode of Conveyance by the Common Law is the *Exchange*. An Exchange is a mutual grant of equal interests, the one in consideration of the other. The word "Exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution (*n*). The estates exchanged must be equal in quantity, not of *value* (for that is immaterial), but of *interest*—as fee simple for fee simple, a lease for years for a lease for years, and the like (*o*). And no livery of seisin, even in exchanges of freehold, was, at the common law, necessary to perfect the conveyance (*p*); for each party stood in the place of the other, and occupied his right, and each of them had already had corporal possession of his own land.] But by the Statute of Frauds, ss. 1, 3, an exchange was required to be in writing; and, by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, it must now be by deed, in every case except that of an exchange of copyhold.

[Moreover, by the common law, entry must have been made on both sides; for if either party died before entry, the exchange was void for want of sufficient notoriety (*q*). And so where two parsons, by consent of patron and ordinary, exchanged their preferments, and the one was presented, instituted, and inducted, and the other was presented and instituted, but died before induction; the former was not entitled to keep his new benefice, because

(*n*) Co. Litt. 50, 51; *Eton College* v. *Bishop of Winchester*, (1774) 3 Wils. 468.

(*o*) Litt. ss. 64, 65; Perk. sect. 275; Shep. *Touch.* 296.

(*p*) Litt. s. 62.

(*q*) Co. Litt. 50 b.

[the exchange was not completed, and therefore he returned back to his own (*r*). And, if after an exchange of lands or other hereditaments, either party was evicted of those which were taken by him in exchange, through defect of the other's title, the party evicted had formerly a right to return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.] Now, by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 4, an exchange of any tenements or hereditaments made by deed executed after the 1st October, 1845, does not imply any condition in law.

The conveyance by exchange at the common law is now obsolete; and in lieu thereof the parties execute *mutual conveyances* of their respective lands, the one to the other. What is above laid down, as to *exchanges*, has no application to such mutual conveyances (*s*); nor, of course, would it apply to exchanges effected under the provisions of Inclosure Acts (*t*).

V. [The fifth mode of Conveyance by the Common Law is a *Partition*. A partition is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands and each to hold a distinct part in severalty (*u*). Here, as in some instances, there is a unity of interest, and in all a unity of possession, it is necessary that they shall all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law, coparceners might make voluntary partition by *parol* only; though joint-tenants and tenants in common could not make it otherwise than by *deed* (*x*). But, under the Statute of Frauds (29 Car. II. c. 3), an instrument in writing, signed

(*r*) Perk. s. 288; *Downes* v. *Craig*, (1842) 9 M. & W. 166.

(*s*) *Eton College* v. *Bishop of Winchester*, (1774) 3 Wils. 491.

(*t*) 8 & 9 Vict. c. 118, ss. 92, 147; 9 & 10 Vict. c. 70; 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 22 & 23 Vict. c. 43.

(*u*) Co. Litt. 165 b.

(*x*) Co. Litt. 169.

[by the party or his agent, was made necessary in every case of partition by way of agreement (*y*);] and, by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, partitions of all hereditaments (not being copyhold) made after the 1st October, 1845, will be void at law, unless made by deed.

[The five conveyances which have now been considered are deemed of a *primary* character. The six which remain are deemed of a *secondary* or *derivative* character, serving only to enlarge, or to confirm or restore, or to transfer or defeat, some interest which has been already created.] These six are (1) the Release; (2) the Confirmation; (3) the Surrender; (4) the Assignment; (5) the Defeasance; and (6) the Lease and Release.

VI. A *Release* is either the conveyance of an ulterior interest in lands or tenements to a particular tenant, or is the conveyance of an undivided share therein to the co-tenant,—(the relessee being in either case in privity of estate with the relessor,)—or it is the conveyance of the right to lands or tenements to a person wrongfully in possession thereof (*z*). And every release was effected without livery of seisin, even though the interest conveyed were freehold; for though the freehold in possession could not pass at common law without livery, yet where another person was already in the possession, a release to him by mere deed was always considered good (*a*). The proper operative word to be employed is "*release*." A deed is in all such cases required (*b*); but, as regards a release of right, that may be *implied by law* from circumstances, and when so implied, it may of course take place without a deed (*c*).

(*y*) Co. Litt. by Harg. 169 a, n. (4).

(*z*) Co. Litt. 264 a; Reeves, *Hist. Eng. Law*, vol. iii., p. 354.

(*a*) Gilb. *Ten.* 53.

(*b*) Co. Litt. 264 b.

(*c*) *Ibid.*

There were five different ways in which a release might enure or operate, that is to say:—

(1.) [By way of enlarging an estate, or *enlarger l'estate*, which is the species of release that most frequently occurs. It consists of a conveyance of the ulterior interest of the remainderman or reversioner to the prior particular tenant; as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives the latter the estate in fee. But to the validity of such releases as these, it is necessary that the estate of the relessee should be a *complete and vested* one (*d*); for if there be lessee for years, and, *before he enters and is in possession*, the lessor releases to him all his right in the reversion, such release is void, because the lessee has, in such case, a mere *interesse termini*, and not an estate upon which a reversion can properly be expectant]; or, as is observed by Lord Coke (*e*), "before entry the lessee has "but *interesse termini;* and therefore a release, which "enures by way of enlarging an estate, cannot work "without a possession, for before possession, there is no "reversion. But if a man make a lease for years, with "remainder for years, and the first lessee doth enter, a "release to him of the remainder for years is good to "enlarge his estate." And further, there must be a *privity of estate* between the relessor and relessee; that is, the one of their estates must be so related to the other as to make but one and the same estate at law, as in the case where the ulterior estate conveyed is a reversion or remainder mediately or immediately expectant upon the particular estate of the relessee; all which, in contemplation of law, form parts of the same estate, as being derived, at the same time, out of the same original seisin (*f*). Thus, if A., seised in fee, make a lease for years, with

(*d*) Co. Litt. by Butl. 270 a, n. (3).

(*e*) Co. Litt. 270 a, 270 b.

(*f*) 2 Prest. Conv. 324; Gilb. *Ten.* 70, 71; *Goodright* v. *Forrester*, (1809) 1 Taunt. 602.

remainder over for life, a release by A. to the lessee for years is good, for he hath both a privity and an estate; and a release to him in the remainder for life is good also (*g*). But if A. makes a lease to B. for life, and B. makes a lease for years, and afterwards A. releases to the tenant for years, this release is void to enlarge his estate, because there is no privity between A. and B.'s lessee for years (*h*). And even a release to a tenant at will is good, because he has a sufficient estate for the purpose, and a privity with the lessor; but a release to a tenant at sufferance is void, because he has a possession without privity (*i*).

(2.) [A release may enure by way of passing an estate, or *mitter l'estate;* as where one of two coparceners releases all her right to the other, this passes the fee simple of the whole (*k*); or where one joint tenant releases to the other or others. But in this species of release, as well as in the former, there must be a privity of estate between the relessor and the relessee (*l*); and therefore one tenant in common cannot release to his companion, because they have distinct freeholds, and there is no necessary unity of title between them (*m*).

(3.) A release may enure by way of *passing a right*, or *mitter le droit*,—as if a man be disseised, and releaseth to the disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*n*).

(4.) A release may enure by way of *extinguishment*,—as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A., this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder, as well as of A.'s particular estate (*o*).

(*g*) Co. Litt. 273 a.
(*h*) *Ibid.* 272 b.
(*i*) *Ibid.* 270 b.
(*k*) *Ibid.* 273.
(*l*) *Ibid.* 273 b.
(*m*) Co. Litt. 200 b; Gilb. *Ten.* 74.
(*n*) Litt. s. 466.
(*o*) *Ibid.* s. 470. [It is very doubtful whether this example

(5.) [A release may enure by way of *entry and feoffment*; as if there be two joint disseisors, and the disseisee releases to one of them, he shall be solely seised, and shall keep out his co-disseisor. And this is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (*p*).]

And note, that in all the four last-mentioned species of release, the fee may be conveyed by any of them without the use of words of inheritance (*q*); and in that respect, these four species of release differ from releases to enlarge the estate,—and indeed from feoffments also, and from grants; for as to all these latter, it is a general rule, that an estate of inheritance cannot be created without the word *heirs* (*r*), or the phrase *heirs of the body*, or (since the Conveyancing Act, 1881 (*s*)), the equivalent words "in fee simple" or "in tail."

VII. [A *Confirmation* is of a nature nearly allied to a release. Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased (*t*); and the words of making it are these, "have given, granted, ratified, approved, and confirmed" (*u*). An instance of the first branch of the definition is, if tenant for life leases for forty years, and dies during that term. Here the lease for years is voidable by him in reversion; yet if the reversioner has confirmed the estate of the lessee for years, before the death of the tenant for life, it is no longer voidable but sure (*x*). The latter branch, or that which tends to the increase of a particular estate, is the same in all respects

would now hold good, since the feoffment by the tenant for life no longer devests the reversion of the relessor.—E. J.]

(*p*) Co. Litt. 278 a.

(*q*) *Ibid.* 9 b.

(*r*) Litt. s. 1; Co. Litt. 8 b.

(*s*) 44 & 45 Vict. c. 41, s. 51.

(*t*) Co. Litt. 295 b.

(*u*) Litt. ss. 515, 531.

(*x*) *Ibid.* s. 516.

[with that species of release which operates by way of enlargement.] And it is to be observed, that a confirmation (like a release, and for the same reason) has always been effectual without livery of seisin, even though a freehold estate be the subject. A deed is essential to the validity of a conveyance of this kind (*y*); though there may be a confirmation *implied by law* from circumstances, as well as a confirmation by deed (*z*).

VIII. [A *Surrender* (*sursum redditio*, or rendering up), is of a nature directly opposite to a release; for as the release operates by the greater estate descending upon the less, a surrender is the falling of the less estate into the greater (*a*). A surrender is defined as a yielding up of an estate for life or for years to him that has the immediate reversion or remainder, wherein, by mutual agreement between them, the particular estate may merge or drown (*b*). The surrenderee therefore must have such an estate, that the estate surrendered may be capable of merging in it; therefore the tenant for life cannot surrender to the remainder-man for years (*c*). A surrender is done by these words, "has surrendered, granted, "and yielded up," or the like (*d*). And though the estate surrendered were for life, there was not, at common law, any occasion for livery of seisin (*e*). For there is a privity of estate between the surrenderor and the surrenderee; and, livery having been once made at the creation of it, there is no necessity for having it afterwards.] Nor was either a deed or other writing required, at common law, to effect the surrender of land (*f*); but, by the Statute of Frauds (29 Car. II. c. 3), s. 3, no lease

(*y*) Shep. *Touch.* by Preston, vol. ii. p. 312.

(*z*) Co. Litt. 295 b; *Doe* v. *Jenkins*, (1826) 5 Bing. 469.

(*a*) Co. Litt. 373 b.

(*b*) *Ibid.* 337 b.

(*c*) Perk. s. 589.

(*d*) 2 Roll. Ab. 497.

(*e*) Co. Litt. 338 a; Shep. *Touch.* 307; *Sleigh* v. *Bateman*, (1597) Cro. Eliz. 487.

(*f*) Co. Litt. *ubi sup.*; Shep. *Touch. ubi sup.*

(except of copyhold) shall be surrendered otherwise than by deed or note in writing, signed by the party or his agent lawfully authorised by writing. This provision refers to express surrenders, or surrenders in fact as they are called, and does not prevent a surrender without writing by *operation of law*; for a surrender, like a confirmation, may be implied by law from circumstances (*g*), as for example, if the tenant during the currency of his lease gave up possession of the land to another tenant to whom the landlord had granted a lease to commence at once, that would imply a surrender of the first lease (*h*). And now, by the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, a surrender in writing of an interest in any tenement or hereditament, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st October, 1845, is void at law unless made *by deed*. Upon a surrender, no entry is required to complete the title of the surrenderee; so that, if a tenant for life or years surrender at a place off the land, to him in reversion, and the latter agree to it, he has the land in him without further ceremony (*i*). If a lessee for life or years make a lease for years, reserving rent, and *then* surrender his estate to his landlord, the estate for years made out of the estate so surrendered will continue notwithstanding the surrender, although, by the common law, the under-tenant was, by such surrender, held discharged (in general) from the rent and other covenants of *his* lease, the reversionary estate to which they were annexed having ceased to exist. And hence, in the case of leases surrendered for the purpose merely of being renewed, it was in the power of the under-lessees (by refusing to surrender, in their turn, notwithstanding they had cove-

(*g*) Shep. *Touch.* 301; Bac. Ab. *Leases* (S.) 3; *Nickells* v. *Atherstone*, (1847) 10 Q. B. 944.

(*h*) *Nickells* v. *Atherstone*, (1847) 10 Q. B. 944; *Fenner* v. *Blake*, [1900] 1 Q. B. 427.

(*i*) Shep. *Touch.* 307, 308.

nanted to do so), greatly to prejudice their immediate landlords, the first lessees. Accordingly, by the Landlord and Tenant Act, 1730, it was provided, in the particular case of a lease surrendered for the purpose of *renewal*, that the new lessee should (without a surrender of the under-lease) have the like remedy as to the rent and covenants, and the under-lessee should hold, as if the original lease had been kept on foot; also, that the chief landlord should have the like remedy, by distress or entry on the lands and hereditaments comprised in such under-lease, for the rents and duties reserved by the renewed lease (so far as they exceeded not those reserved by the original lease), as he would have had if such original lease had been kept on foot (*k*). And, under the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 9, when the immediate reversion on a lease for years is merged in the next ulterior estate, that ulterior estate becomes (for all the purposes of the lease) the immediate reversion on the lease.

IX. [An *Assignment* of land or real estate is properly a transfer, or making over to another, of a person's whole interest therein, whatever that interest may be; but it is more particularly applied to express the transfer of an estate for life or years. And it differs from a lease only in this, that by a lease a man grants an interest less than his own, reserving to himself a reversion, whereas, by an assignment, he parts with the whole property, and the assignee consequently stands in the place of the assignor.] Thus, where a lease is assigned, the assignee (as well as the lessee) is liable to the landlord or reversioner, for the future performance of the covenants of the lessee, and such assignee remains liable to the landlord as reversioner until he in his turn assigns over to another (*l*); and this

(*k*) *Cousins* v. *Phillips*, (1866) 35 L. J. Ex. 84; and see (as regards *crown* lands) 8 & 9 Vict. c. 99, s. 7.

(*l*) *Moule* v. *Garrett*, (1872) L. R. 7 Exch. 101.

liability attaches to him even without entry (*m*), where assignment is by deed. And conversely, the assignee is entitled to enforce against the reversioner any covenant of the lessor, which is incident to the relation of landlord and tenant; and in case the lessor conveys his interest to another, then to enforce it, also, against the assignee of the lessor, *i.e.*, against the grantee of the reversion (*n*). But if the transfer be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between the transferee on the one hand, and the reversioner or the grantee of the reversion on the other hand. For it is then an under-lease and no assignment; and the alienee, not coming precisely into the place of the alienor, is in no privity with the reversioner (*o*).

No deed or other writing was necessary, at common law, to the validity of an assignment, though, in the case of a lease for life, it could not be effected without livery of seisin: but, by the Statute of Frauds, s. 4, the same provision as to the necessity of a written instrument was made, with respect to an assignment, as before mentioned in the case of a surrender. And now, by the Real Property Act, 1845, s. 3, an assignment of a chattel interest (not being copyhold) in any tenements or hereditaments, made after the 1st October, 1845, is void at law, unless made by deed. The proper operative words in an assignment are "assign, transfer, and set over"; but it may be effected by any words which are sufficient to express the intention (*p*). And words of purported assignment will be read as words of under-letting, and *vice versâ*, according as the transaction is in fact an under-letting or an assignment (*q*).

(*m*) *Williams* v. *Bosanquet*, (1820) 1 Brod. & Bing. 248.

(*n*) 32 Hen. 8, (1540) c. 34; Conveyancing Act, 1881, ss. 10—12. *Wright* v. *Burroughes*, (1847) 3 C. B. 685.

(*o*) *Beardman* v. *Wilson*, (1869) L. R. 4 C. P. 57.

(*p*) *Parmenter* v. *Webber*, (1818) 2 Moo. 656; *Hartshorne* v. *Watson*, (1838) 5 Bing. N. C. 477.

(*q*) *Beardman* v. *Wilson*, (1869) L. R. 4 C. P. 57.

X. [A *Defeasance* is a collateral conveyance, made at the same time with another conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*, or totally undone. And in this manner mortgages were in former times usually made ; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, *when executed at the same time with the original conveyance*, was considered as part of it by the antient law, and, on that account only, was indulged (*r*) ; for a conveyance of the freehold, at common law, could not be defeated or recalled by a deed of defeasance executed *afterwards*. And if such conveyance (being a conveyance by the common law) contained a proviso that it should be lawful for the grantor by subsequent act to revoke the same, the proviso was void for repugnancy (*s*). But things that were merely executory, or to be completed by matter subsequent,—as rents (of which no seisin could be had till the time of payment), annuities, conditions, warranties, and the like,—were always liable to be recalled by defeasances made subsequent to the time of their creation (*t*).] Defeasances of land are now of rare occurrence, the practice in modern times being (as in the case of mortgages) to include in the same deed both the conveyance of the land to the alienee and the conditions (if any) to which it is to be subject, and by which its effect may be defeated.

XI. The common law conveyance termed a *Lease and Release* (*u*), obtained where one, desirous to convey in fee, first made a lease to the proposed alienee—for example, for one year—which demise, if perfected by actual entry,

(*r*) Co. Litt. 236.
(*s*) *Ibid.* 237 a.
(*t*) Co. Litt. 237 a.
(*u*) Reeves, *Hist. Eng. Law*, vol. iii. p. 357 ; vol. iv. p. 356.

conferred on him a complete leasehold estate: and the lessee then became capable of receiving a release of the reversion, for he would be tenant of the particular estate on which that reversion was expectant. The next step therefore was to execute a release of the land to him and his heirs; so that by the conjoint operation of the two conveyances he became, without livery of seisin, tenant in fee in possession, the release operating by way of *enlarging the estate of the lessee*. This Lease and Release must be carefully distinguished from the much better known conveyance by so-called Lease and Release, operating by virtue of the Statute of Uses. Of this latter conveyance something will be said in the next chapter.

CHAPTER XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.

SECOND, among *Conveyances by Statute Law*, we will first consider those conveyances which are founded on the Statute of Uses, that statute having had a very extensive influence upon conveyancing. And there are *five* such conveyances, namely, (1) the Feoffment to Uses; (2) the Covenant to Stand seised to Uses; (3) the Bargain and Sale; (4) the Lease and Release; and (5) the Grant to Uses.

I. A *Feoffment to Uses.*—This was simply the ordinary conveyance by the common law, with a limitation to uses superadded. Thus, if A. were desirous to convey to B. in fee, he might do so by enfeoffing a third person, C., (of course with livery of seisin,) to hold to him and his heirs to the use of B. and his heirs; the effect of which was to convey the legal estate in fee simple to B. For the legal estate passed to C. by means of the livery, in like manner as it would have done before the statute; but no sooner had this taken place, than the limitation to uses began to operate, and C. thereby became seised to the use limited. The consequence of which was that, by force of the statute, the legal estate was *eo instanti* taken out of C. and vested in B., for the like interest as was limited in the use, that is, in fee simple. B. thus became the legal tenant as effectually as if the feoffment had been made to himself, without the intervention of a trustee. This method, however, involving as it did the necessity of making livery of seisin, was never of frequent occurrence in modern practice (*x*).

(*x*) 2 Sand. *Uses*, p. 13.

II. [A *Covenant to Stand Seised to Uses.*—This was a conveyance adapted to the case where a person seised of land in possession, or for a vested remainder or reversion, proposed to make provision out of his estate for his wife, child, or kinsman (*y*); and in its terms it consisted of a covenant by the owner, in consideration of natural love and affection, to stand seised of his estate to the use of the intended transferee. Before the Statute of Uses, this would merely have raised a Use in favour of such party, but since that statute, the legal estate was transferred to him; for, the covenantor being by the effect of his covenant seised to the use of the covenantee, the statute immediately executed that Use. But the conveyance in question was held to be ineffectual, unless the parties to it were connected by blood or marriage; for, if they were not so connected, no Use was raised in contemplation of equity by the covenant, and therefore there was no Use for the statute to take effect upon (*z*). On account of inconveniences arising from this doctrine, and for other reasons, this species of conveyance became by degrees wholly laid aside.

III. A *Bargain and Sale.*—This conveyance was a kind of real contract whereby the bargainor, being seised of land, for some pecuniary consideration bargained and sold, that is, contracted to convey it to the bargainee. By the effect of the bargain and sale, the bargainor, on receiving the price, became seised to the use of the bargainee, in fee, in tail, for life, or for years (according to the nature of the limitation). This, before the statute, was the whole effect of the instrument; but afterwards the statute executed the Use, and clothed the bargainee with the commensurate legal estate. Or, as was said, the bargain first vested the Use, and then the statute vested the possession. But as it was essential to the efficacy of

(*y*) 2 Sand. *Uses*, pp. 34, 94. Reeves, *Hist. Eng. Law*, vol. iv. p. 162.
(*z*) 2 Sand. *Uses*, pp. 90, 94;

[a covenant to stand seised, that it should be made in consideration of natural affection, so it was requisite in the case of a bargain and sale, that it should be founded on *bonâ fide pecuniary* consideration; for otherwise no Use would be raised, and there would be nothing for the statute to operate upon.]

And with respect to this conveyance, it is to be observed, that it possessed in a peculiar degree the recommendation to which we before adverted, of enabling parties to transfer a freehold without livery of seisin. For the covenant to stand seised could rarely be made available to the purpose, as it operated only between persons standing in particular relations to each other; but in the extensive class of conveyances which take place between seller and purchaser, a bargain and sale afforded the ready means of dispensing with livery of seisin and attornment; since by the insertion into the deed of a small sum of money, as the nominal consideration of a transfer, it was easy, even when the transaction was not really of the pecuniary kind, to obtain the benefit of this mode of conveyance (*a*). And not only the freehold in possession might be thus conveyed without livery, but a remainder or reversion might also be passed by the same method, and that without *attornment* (*b*). [But secret transfers of land being opposed to the policy of the law, the legislature, as soon as it perceived that these might be accomplished with facility by means of the bargain and sale, hastened to provide a remedy (*c*); and accordingly it was enacted, by the 27 Hen. VIII. c. 16 (called the Statute of Inrolments), that no bargain and sale should enure to pass a *freehold*, unless the same were by *deed indented*, and *inrolled* within six months after its date, in one of the courts of Westminster Hall, or else with the *custos rotulorum* of the county, or with the proper officer of certain corporate towns.]

(*a*) 2 Sand. *Uses*, p. 41.

(*b*) 1 Saund. by Wms. 234 b, n. (4); *Shove* v. *Pincke*, (1793) 5 T. R. 124.

(*c*) 2 Sand. *Uses*, pp. 43, 44, 51; Bac. *Use of Law*.

A bargain and sale, it is to be observed, was also capable of conferring a complete estate for years, without entry, a property that belonged not to a conveyance at common law; for a common law lease for years gives no complete estate until entry has been made. It is, therefore, to be understood, that if a man bargained and sold his land for a term of years, the use thus raised was executed and became a complete estate for years, by force of the statute, without any additional ceremony; upon the same principle that a bargain and sale, in respect of a freehold interest, enured to pass the freehold, without livery of seisin(*d*). The Statute of Inrolments had no application to bargains and sales for mere terms of years; and a bargain and sale for a term of years was therefore effectual without inrolment.

No particular form of words was essential to the legal efficacy either of a bargain and sale or of a covenant to stand seised (*e*); and although "bargain and sell" were the words of transfer ordinarily used in the one case, and "covenant to stand seised" in the other, yet other words would have the same effect (*f*), the distinctive character of each of these conveyances being determined by the consideration on which it was founded (*g*). Of course, if the words employed were such as to indicate that there was no intention of transferring the property, but that there was merely an engagement to convey by a future instrument, no Use would arise, and consequently no estate would pass (*h*).

The rule which required a bargain and sale to be founded on pecuniary consideration was ultimately held to be matter of form only, and to be sufficiently complied with if the conveyance *purported* to be founded on such a consideration. Any trivial sum might be inserted (*i*);

(*d*) *Barker* v. *Keate*, (1677) 2 Mod. 249; *Mallory's Case*, (1600) 5 Rep. 227.

(*e*) 2 Sand. *Uses*, pp. 56, 90; *Doe* v. *Davies*, (1837) 2 M. & W. 503.

(*f*) 2 Sand. *Uses*, p. 90.

(*g*) 2 Fonb. *Eq.* 47.

(*h*) 1 Sand. *Uses*, pp. 118, 120.

(*i*) 2 Sand. *Uses*, p. 54.

and it was immaterial whether the sum so inserted were actually paid or not (*k*). But for the legal efficacy of this conveyance, it was required by the Statute of Frauds (29 Car. II. c. 3) to be in writing, and is required by the Real Property Act 1845 (8 & 9 Vict. c. 106), s. 4, to be by deed.

IV. [A Lease and Release.—This conveyance consisted of two separate parts, first, a bargain and sale, and second, a common law conveyance by release; and (like the bargain and sale), it was adapted to the case where a person seised of land in possession, or for a vested remainder or reversion, proposed to convey his interest to another.

The conveyance by lease and release obtained, as we have seen, occasionally at the common law; and when the Statute of Inrolments rendered it impossible to effect a secret conveyance of the freehold, by the simple method of bargain and sale, Serjeant Moore (*l*), one of the most learned practitioners of the day, invented for the purpose a new conveyance under the Statute of Uses analogous to the common law lease and release (*m*). Instead of a lease, the conveying party was made to execute a bargain and sale for some leasehold interest—for example, for the term of one year; and this, without any inrolment, passed the legal estate for a year to the bargainee (the Statute of Inrolments extending to freeholds only). The estate so transferred was complete without actual entry (*n*). The bargainee, therefore, was capable of receiving immediately thereafter a release of the freehold and reversion (*o*). And accordingly the next day this release was granted to him (*p*). This compound conveyance was called, like its common law prototype, a Lease and Release; but,

(*k*) Sugd. Gilb. 96. But see Challis, *R. Prop.* p. 383.

(*l*) Reeves, *Hist. Eng. Law*, vol. iv. p. 355.

(*m*) 2 Sand. *Uses*, p. 71; 2 Prest. *Conv.* 219.

(*n*) Sand. *ubi sup.*

(*o*) Sand. *ubi sup.*; 2 Prest. *Conv.* 219.

(*p*) 2 Prest. *Conv.* 219.

[properly speaking, it was rather a *bargain and sale* and *release*. As it was competent to pass the freehold without livery of seisin, entry, or inrolment, or any other ceremony than the execution of the deeds themselves (*q*), and was in some other technical points more advantageous than a bargain and sale, it soon grew into common use (*r*), and became so generally established as almost entirely to supersede every other method of conferring a freehold estate, whether at the common law or under the Statute of Uses. The lease (or bargain and sale) and the release, in practice, used always to constitute separate deeds, the former bearing date the day before the latter; but if comprised in the same deed, they were understood to be equally effectual (*s*). The release being a conveyance operating at common law, it was usual to declare Uses upon it. If the Use declared was one to the relessee himself in fee, he took the legal estate as at common law; but if it was to a third person, it was executed by the statute, and the legal estate passed accordingly to him.]

By 4 & 5 Vict c. 21, a release expressed to be made under that Act had the same effect as a lease and release. This enactment, which was rendered useless by s. 2 of the Real Property Act, 1845, is now repealed by the Statute Law Revision Act (No. 2), 1874.

V. A Grant to Uses:—By reason of the provision of the Real Property Act, 1845, s. 2, to the effect that corporeal hereditaments "shall, as regards the conveyance "of the immediate freehold thereof, be deemed to lie in "grant as well as in livery," all conveyances of hereditaments, whether corporeal or incorporeal, whether in possession or in expectancy, and whether for an estate of freehold or for an inferior estate, may now be brought within the range of that common law conveyance discussed in the last chapter under the head of Grant; though, in

(*q*) 2 Sand. *Uses*, p. 72.
(*r*) *Ibid.* p. 60.
(*s*) Sugd. Gilb. 229 (n.).

its antient and proper application, the conveyance by Grant was confined to the transfer of *incorporeal* hereditaments and estates in expectancy. It is the practice of conveyancers to import into the grant of corporeal hereditaments limitations to Uses; and a conveyance so framed (when the Use is not limited to the grantee) takes effect under the Statute of Uses. For while the seisin to the Use is created by force of the Real Property Act, 1845, the Use is converted into the legal estate by force of the Statute of Uses. And the operation is the same in a conveyance under the Conveyancing Act, 1881, which has made the use of the word "grant" unnecessary (*t*).

In all these conveyances under the Statute of Uses it is, of course, necessary that all the circumstances required to bring the Statute into operation should be present. Thus some Use (either *in esse* or otherwise) must be raised, and some sufficient seisin to such use constituted by them; or, in the language of conveyancers, there must be a seisin proper to support or *serve* the Use (*u*). From this necessity of a seisin to a Use it follows, that an existing term of years cannot be transferred by any method of conveyance depending on the Statute of Uses for its operation; for of a mere chattel interest there can be no seisin. The owner of the freehold may, however, create out of it by these methods a term of years; for he has a seisin out of which the Use for the term may be served (*x*). And, for a different reason, while a conveyance could be made by means of the Statute of Uses to a corporation, a corporation could not so convey to another corporation or to an individual. The reason of this distinction was that sect. 1 of the Statute of Uses made that Act operate only where a "person" was seised to the use of another "person" or "body corporate," which the Courts held to mean, that in order that the Act might apply,

(*t*) 44 & 45 Vict. c 41, s. 49.
(*u*) 2 Sand. *Uses*, p. 59 1 Sand. *Uses*, pp. 97, 133, 140.
(*x*) 2 Sand. *Uses*, p. 59.

the seisin must be in an individual, while the Use might be either in an individual or a corporation (*y*). Therefore, when corporations had occasion to make conveyances of their lands, the method adopted was commonly that of a feoffment, or a lease with actual entry, followed by a release (*z*). But, of course, a corporation, equally with an individual, can now make an effective conveyance, whether for a freehold or for a leasehold interest, either by Grant under the Real Property Act, 1845 (*a*), or by simple conveyance under the Conveyancing Act, 1881.

The Use which is required for the purpose of a conveyance under the Statute of Uses may be either *express* or *implied*. Thus, if A. convey by feoffment or by lease and release to B. in fee, without consideration, and without declaring any Use, there will be a *resulting* Use, by construction of law, to A. himself; and such Use the statute will execute accordingly (*b*).

A limitation of the legal estate by way of Use is governed by the same principles that apply to the creation of estates by a common law assurance (*c*). Thus the word *heirs*, which used to be necessary, at common law, to create an estate of inheritance, was in like manner necessary in a conveyance to Uses; so that, if a man bargains and sells to A., without adding *and his heirs* (or the now equivalent expression *in fee simple*), A. has only an estate for life (*d*). So an estate may be limited by way of Use (as well as by a common law conveyance) in possession, in remainder, or in reversion (*e*). So the remainder by way of Use may be either vested or contingent (*f*); and if contingent is subject to the common law rule, that it cannot be limited

(*y*) Bacon, *Uses*, 42, 57; *Fulmerston* v. *Steward*, (1554) Plowd. 102.

(*z*) 2 Sand. *Uses*, p. 59; Sugd. Gilb. 7, n. (1).

(*a*) 8 & 9 Vict. c. 106.

(*b*) Co. Litt. 271 b; 1 Sand. *Uses*, pp. 106, 109; *Doe* v. *Rolfe*, (1838) 3 N. & P. 648.

(*c*) 1 Sand. *Uses*, pp. 123, 124; *Corbet's Case*, (1599) 1 Rep. 83 b.

(*d*) 1 Sand. *Uses*, p. 124.

(*e*) Sugd. Gilb. lvii., lviii.

(*f*) *Ibid.* lviii. 153.

on a particular estate less than a freehold (*g*). Legal estates created by way of Use are also subject, in general, to the same incidents as if created by the methods of the common law (*h*). Thus, where a particular estate was limited by way of Use, it was formerly liable to forfeiture if the tenant made a feoffment for a larger estate than his interest warranted. And in the same way, if a contingent remainder was limited by way of Use, and the particular estate was destroyed before the contingency happened, the remainder was defeated (*i*); or if it was not ready to vest in possession on the natural determination of the preceding freehold, it failed. But now, by the Real Property Act, 1845, s. 8, the premature destruction of the preceding freehold does not defeat contingent remainders following it, whether these are created at common law or by way of Use; and by the Contingent Remainders Act, 1877, any contingent remainder created after 2nd August, 1877, by way of Use will not fail merely because the preceding estate determines before it is ready to vest in possession.

But a limitation by way of Use, although thus subject in general to common law principles, was, in other material particulars, allowed a greater latitude (*k*). For,—

1. By the common law, a man could not in any case be a purchaser, that is, take an estate, under his own conveyance; for he could not, in the nature of things, unite the opposite capacities of grantor and grantee, feoffor and feoffee (*l*). On the other hand, it has always been practicable for a man indirectly, and through the medium of a limitation to Uses, to become a purchaser of his own estate. Thus, A. may by feoffment, or lease and release, convey to a third person, C., to the use of himself, the grantor, for life, with remainder to the use of B., in tail or in fee; or to the use of B. for life, with remainder to the use of himself, the grantor, in tail. And

(*g*) Sugd. Gilb. lviii. 164, 165.
(*h*) 1 Sand. *Uses*, p. 166.
(*i*) Sugd. Gilb. p. 298.
(*k*) 1 Sand. *Uses*, p. 130.
(*l*) *Ibid.* 131, 132; 2 Prest. *Est.* 20.

in both these cases A. will take the legal estate by purchase accordingly (*m*). Yet, if the remainder were to the use of himself in *fee*, he would not at one time have taken by purchase,—at least not in such a sense as to have made himself a purchasing ancestor, such a Use having been considered as amounting only to the *old Use in reversion*, so that it would have been converted by the statute into a legal estate in *reversion* (*n*). Such was the state of the law at the time of the passing of the Inheritance Act, 1833. That Statute (sect. 3), however, enacted, that "when any land shall have been limited by "any assurance, executed after the 31st December, 1833, "to the person or to the heirs (*o*) of the person who "shall thereby have conveyed the same land, such person "shall be considered to have acquired the same as a "*purchaser* by virtue of such assurance, and shall not be "considered to be entitled thereto as of his former estate "or part thereof." And just as a man could not, at the common law, convey to himself, so he could not convey to his wife, for she was considered as the same person with him (*p*). Here again, however, the object could be effected through the medium of a limitation to Uses, by creating a seisin in another person, and declaring a Use to the wife (*q*). But, now, under the Conveyancing Act, 1881, a man may convey freeholds directly to his wife, either alone or jointly with another or others (*r*), and may also convey freeholds directly to himself and another. But if he wishes to convey to himself alone, he still can do so only by a conveyance by way of Use.

(*m*) Co. Litt. by Harg. 13 a, n. (2); 1 Sand. *Uses*, p. 135; Sugd. Gilb. pp. 150, 151.

(*n*) Co. Litt. 23 a; *Wood* v. *Douglas*, (1885) 28 Ch. D. 327; *Moore* v. *Simkin*, (1885) 31 Ch. D. 95.

(*o*) A limitation by a man to his own heirs, is equivalent to a limitation to himself and his heirs; "for," says Lord Coke, "*hæres est* "*pars antecessoris*." (Co. Litt. 22 b; 1 Vent. 378; 1 Rep. 129 b, 130 a.)

(*p*) Co. Litt. 112 a; *Lucas* v. *Lucas*, (1738) 1 Atk. 271.

(*q*) 1 Sand. *Uses*, p. 132.

(*r*) 44 & 45 Vict. c. 41, s. 50.

2. At common law, a freehold could not be created to commence *in futuro*, or, in other words, could not be limited to take effect at a future period, except by way of remainder upon some particular estate also passing at the same time out of the grantor. This, however, might be effectually done by a conveyance under the Statute of Uses; for a Use might be limited for any extent of interest to commence *in futuro*, and the statute transmuted such future interest into a legal estate (*s*). Thus, a man might covenant to stand seised in fee to the use of another (or bargain and sell to him in fee) seven years hence, and such conveyance would be effectual (*t*); or by feoffment, or lease and release, an estate might have been conveyed to A. and his heirs to the use of B. and his heirs, at the death of C. (*u*). A Use thus limited *in futuro*, independently of any preceding estate, is sometimes called a *springing* Use (*x*); and such Use is also often described as an *executory* Use, because it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. Thus, in the two first examples, the whole fee would remain in the covenantor or bargainor, till the seven years had expired (*y*); in the two latter, a Use resulted to the feoffor or relessor, till the death of C. (*z*). But on these events happening, the so-called springing Use would be executed, and the *cestui que use* would become clothed with a legal estate in fee.

3. By a common law conveyance, an estate could not be limited, upon a future event, to one person, in abridgment or defeasance of an estate of freehold, first limited in another (*a*). Thus, land could not be conveyed to B. in fee, or for life, with a provision that when C. returned from Rome it should thenceforth immediately go over to

(*s*) Sugd. Gilb. 161 (n).
(*t*) 1 Sand. *Uses*, p. 139.
(*u*) *Ibid.* 140.
(*x*) Sugd. Gilb. 153.
(*y*) *Ibid.* 156, (n.), 153 (n.).
(*z*) 1 Sand. *Uses*, p. 140.
(*a*) Co. Litt. by Butl. 203 (b), n. (1); *Cogan* v. *Cogan*, (1596) Cro. Eliz. 360; *Blackman* v. *Fysh*, (1892) 3 Ch. 209.

C. in fee (*b*); for this would have been to defeat the first estate by force of a condition, which could only be done by the entry of the grantor, or his heirs. And the effect of such entry would have been to destroy the second limitation as well as the first, and to have restored the grantor and his heirs to their former estate (*c*). But a Use might always be made to shift, in this manner, from one person to another (*d*); and therefore, since the statute, the legal estate may be conveyed, through the medium of a Use, in like manner, as by limiting the fee to A. and his heirs to the use of B. and his heirs, with a proviso, that when C. returns from Rome the land shall be to the use of C. and his heirs (*e*). A Use so limited in derogation of a preceding estate is called a *shifting* or *secondary* Use (*f*); and this also is of the *executory* kind, the operation of the statute being suspended till the event arrives (*g*). It is to be observed, however, that there can be no fee simple limited after a fee simple, even under the Statute of Uses, unless where the second fee simple be either in defeasance of the first fee simple, or in the nature of an alternative limitation.

It was firmly settled, also, that no estate capable of being considered as a remainder (according to the rules by which remainders are limited) should ever be construed as a shifting or springing Use (*h*). This maxim has now been deprived of its chief practical importance by the Contingent Remainders Act, 1877 (*i*), already referred to. That statute enacts that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil revived or republished after that date, which would have been valid as a

(*b*) Fearne, by Butl. pp. 14, 15.

(*c*) Co. Litt. 379 a; Litt. ss. 721, 722, 723.

(*d*) Sugd. Gilb. 153, 154, (n.); 1 Sand. *Uses*, p. 152.

(*e*) *Ibid.* p. 149.

(*f*) Sugd. Gilb. 152, (n.); 2 Bl. Com. 335.

(*g*) Sugd. Gilb. 154, 155, (n.); 1 Sand. *Uses*, p. 144.

(*h*) 2 Saund. by Wms. 388; Fearne, by Butl. 393, 9th edit.

(*i*) 40 & 41 Vict. c. 33.

springing or shifting Use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the prior particular estate of freehold determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting Use, or other executory limitation.

4. The grantor, in a common law conveyance, could not reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument; for that was deemed repugnant to the conveyance itself (*k*). The utmost that the common law allowed was a deed of defeasance (coeval with the grant, and therefore esteemed a part of it) upon events specifically mentioned (*l*). But the limitation of a *Use*, subject to a power of this description, was not considered as involving any repugnancy. A Use was originally a mere direction to the trustee how he was to deal with the legal estate, and the direction might be recalled or changed (*m*). In a conveyance, therefore, under the Statute of Uses, a proviso giving to the grantor, the grantee, or a stranger, authority to revoke or alter, by a subsequent act, the estate first granted, would be valid, being in effect no more than an authority to revoke the Use first limited, and to declare a new one (*n*). Such provisoes are called *powers*, a term properly applicable to *all* authorities, as distinguished from *estates*. Such powers are either mere *powers of revocation*, enabling the grantor simply to recall what he has bestowed; or they are *powers of revocation and of new appointment* (*o*), or of *appointment* simply, authorizing the grantor, or some other person, to make a new disposition of the estate. Powers of

(*k*) Co. Litt. 237 a; 2 Fonb. 158, 159.

(*l*) *Ante*, p. 317.

(*m*) Sugd. Gilb. 158, (n.).

(*n*) *Ibid.*

(*o*) 1 Sand. *Uses*, p. 155; 4 Cruise, Dig. 228.

revocation and of new appointment are of frequent occurrence in family settlements, their object being to carry into effect with greater convenience the arrangements actually contemplated. Thus, if a life estate be limited to the settlor, with remainder over, it was, before the Settled Land Act, 1882, common to insert a power enabling him from time to time to make effectual leases of the property in possession, for terms not exceeding twenty-one years, a privilege reasonable and convenient in itself, but which (apart from statute) was not incident to the estate of a tenant for life generally. Of the same nature, in general, are the usual powers of jointuring, selling, charging land with the payment of sums of money, and the like (*p*). All these are technically described as powers of revocation and of new appointment, because, in authorizing a new disposition not made by the conveyance itself, they operate *pro tanto* as a revocation of those which it contains (*q*). Such a power, if closely considered, will be found to amount to an authority to create a Use, to take effect in derogation, to a certain extent, of the Uses first limited; or rather to the virtual limitation of an *executory* Use of that description, in favour of such person, and for such estate, as shall be defined by the subsequent act of the donee of the power (*r*).

The subsequent exercise of the power is called an *appointment*. Its effect is to raise, in favour of the appointee, a Use corresponding to the estate appointed. This Use being served out of the original seisin, is immediately executed by the statute, and transmuted into the equivalent legal estate (*s*). As a general rule, the mode of exercising the power prescribed must be strictly followed; but where the power is to be

(*p*) 2 Sand. *Uses*, p. 81.

(*q*) *Ibid.* p. 155; 4 Cruise, *Dig.* 228.

(*r*) Sugd. Gilb. 152, 153, (n.); 2 Sand. *Uses*, p. 81.

(*s*) 2 Sand. *Uses*, p. 82; 4 Cruise, *Dig.* 228.

exercised by deed, a deed attested by two witnesses is now in all cases sufficient (*t*). An appointment is not considered as an independent conveyance (*u*). It is merely ancillary to the deed creating the power; which (as already observed) contains, in effect, a prospective limitation of the new Use. The appointee, therefore, is considered for most purposes as deriving his title under the original conveyance, and to be in the same position as if that instrument had actually contained a limitation in his favour, to the extent of the estate appointed (*x*). And with regard to such powers generally, the Conveyancing Act, 1881 (*y*), sect. 52, enables the donee of a power, whether coupled with an interest or not, to release the power by deed, or by deed to contract not to exercise the power; and the Conveyancing Act, 1882 (*z*), sect. 6, enables him to disclaim the power.

Not only as to the limitation of estates, but in other particulars, there are differences between conveyances to Uses and conveyances at common law. The possession was indeed given by the conveyance to Uses, quite as effectually as if the alienee had received livery of seisin, or had made actual entry (*a*); but as the conveyance to uses, *e.g.*, a bargain and sale, conveyed the possession by construction of law only, so it differed from a feoffment in such incidents as resulted from delivery of possession in point of fact. Therefore, though a feoffment, when made by the tenant in actual possession, was capable of passing a wrongful estate of freehold, and, when made by a particular tenant for a greater estate than he could lawfully convey, occasioned a forfeiture (or, in the case of a tenant in tail, a discontinuance) of the particular estate, and the contingent remainders dependent on that estate

(*t*) Law of Property Amendment Act, 1859, s. 12.

(*u*) 2 Sand. *Uses*, p. 84.

(*x*) 4 Cruise, *Dig.* 282, 497; *Bringloe* v. *Goodson*, (1838) 4 Bing. N. C. 734; Sugd. *Powers*, p. 470.

(*y*) 44 & 45 Vict. c. 41.

(*z*) 45 & 46 Vict. c. 39.

(*a*) 2 Sand. *Uses*, p. 52.

were defeated, no such results followed from any conveyance by way of Use (*b*). For by the feoffment there was an actual investiture of the possession, as for an estate of freehold, which, it was held, must take effect, either lawfully, or tortiously (as it was called). On the other hand, conveyances by way of Use could, in their nature, pass no more than the grantor might lawfully transfer (*c*). They received accordingly the appellation of *lawful* or *innocent* conveyances (*d*). Since the Real Property Act, 1845, s. 4, which enacts that henceforth a feoffment shall not have any tortious operation, this distinction has so far lost its importance.

The Statute of Uses, while it thus enabled owners to dispose of their lands in methods more suitable to the exigencies of social life, opened the door at the same time to inconveniences of a different description. These the policy of the law thought fit to regulate by the rule, called the Rule against Perpetuities, against the creation of too remote limitations. This rule we shall now proceed to explain (*e*). We have seen as regards remainders, that, even under a strict settlement, an estate tail could not, after *Taltarum's Case*, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the nonage of the tenant in tail next in remainder: for, on attaining the age of twenty-one, the latter was competent, with the concurrence of the former, to suffer a recovery. By analogy to that limit (*f*), it was settled that, as regards executory interests, and springing or shifting Uses, an estate limited by way of executory Use must vest within, at the latest, some life or lives in being, and twenty-one years afterwards (*g*). For example,

(*b*) 2 Sand. *Uses*, p. 73.

(*c*) Fearne by Butler, p. 322.

(*d*) *Ibid.* p. 322.

(*e*) Co. Litt. by Butler, 379 b, citing 327 a; Reeves, *Hist. Eng. Law*, vol. iii. p. 324; *Cadell* v. *Palmer*, (1835) 10 Bing. 140; *In re Mervin*, [1891] 3 Ch. 197.

(*f*) Co. Litt. by Harg. 20 a; note (5).

(*g*) *Cadell* v. *Palmer*, (1835) 10 Bing. 140; S. C. 7 Bligh (N.S.) 202.

if a man be seised in fee of lands, and gives them to the first son of J. S. that shall attain the age of twenty-one years, this limitation is good within the rule. Here the estate must at the latest vest on the expiration of J. S.'s life and the infancy of his son. Such infancy, generally speaking, will not endure beyond twenty-one years after J. S.'s death: but if the son is born *posthumously* it will endure a short further time, namely, the time of gestation *in utero* which follows upon J. S.'s death. Again, when the period at which the estate is limited to vest comprises no life or lives in being, it is not allowed to exceed twenty-one years from the time when the limitation is created (*h*), —together with, of course, the period of gestation, if any. And all limitations following a limitation void as contrary to the rule against perpetuities are also void (*i*). And the law so much abhors a perpetuity (*k*), that any limitation, either for a legal or for an equitable interest, by way of executory Use, or otherwise, of such a nature as to lead to the possibility, if it were allowed, of exceeding the limit of time prescribed by this Rule against Perpetuities, is absolutely void (*l*). And the rule applies also to terms of years and to purely personal property (*m*), but not to covenants running with the land or to personal contracts. In furtherance of the rule, it has been enacted by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10, with regard to instruments coming into operation on or after the 1st January, 1883, that an executory interest, in *land*, to take effect in default of issue, or on failure of the issue, of the tenant of the executed estate, shall become void as soon as any of such issue attains the age of twenty-one years.

In connection with the Rule against Perpetuities,

(*h*) *Palmer* v. *Holford*, (1818) 4 Russ. 403.

(*i*) *Hale* v. *Hale*, (1876) 3 Ch. D. 643.

(*k*) 10 Rep. 113 b.

(*l*) *Cadell* v. *Palmer*, *ubi sup.*; *In re Mervin*, [1891] 3 Ch. 197.

(*m*) *Atkinson* v. *Hutchinson*, (1734) 3 P. Wms. 262.

the law limiting the Accumulation of Income may also properly be considered. In the case of Mr. Thellusson's will (*n*), where there was a direction, that the income of the testator's property should be accumulated during the lives of all his children, grandchildren, and great-grandchildren, living at the time of his death, and the lives and life of the survivors and survivor of them, for the benefit of descendants living at the death of the survivor, the court held that the direction (seeing that it kept well within the Rule against Perpetuities) was valid. The legislature, however, thought it expedient to put a check, for the future, on dispositions of that description (*n*). Accordingly, by the Accumulations Act, 1800, commonly called the Thellusson Act, it was enacted, that no such accumulation should be allowed for a longer term than the life of the grantor, *or* twenty-one years from the death of the grantor or testator, *or* during the minority of any person living or *in ventre sa mère* at the death of such grantor or testator, *or* during the minority only of any person who, under the Uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated. It is to be noted that these periods are not cumulative, but alternative; that is, the accumulation directed must be for only one of them (*o*). The statute further enacted, that, where any accumulation was directed contrary to the Act, such direction, if it specified a time that would be in excess of the limit prescribed by the Rule against Perpetuities, should be totally void; and, if it expressed a time that would not be in excess of that limit, should be void for the period which was in excess of the limit prescribed by the Thellusson Act (*p*). In the latter case, the income during the time the property is directed to accumulate contrary to the Act, is to

(*n*) Fearne, by Butler, p. 436 (n.).

(*o*) *Jagger* v. *Jagger*, (1884) 25 Ch. D. 729.

(*p*) See *Re Pope*, *Sharp* v. *Marshall*, [1901] 1 Ch. 64.

go to such person as would have been entitled thereto, if no such accumulation had been directed (*q*). The Act does not extend, however, to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of wood or timber (*r*). Further, by the Accumulations Act, 1892 (*s*), which came into force on the 28th June, 1892, no person may now settle any property in such manner as that the rents or income thereof (or any part of such rents or income) shall be accumulated, for the purchase of *land* only, for any longer period than during the minority of the person entitled to the land to be purchased.

(*q*) *Jagger* v. *Jagger*, (1884) 25 Ch. D. 729.

(*r*) *Halford* v. *Stains*, (1848) 16 Sim. 488; *Edwards* v. *Tuck*, (1854) 3 De G., M. & G. 40; *Matthews* v. *Keble*, (1868) L. R., 3 Ch. App. 691.

(*s*) 55 & 56 Vict. c. 58.

CHAPTER XIX.

OF CONVEYANCES BY TENANTS IN TAIL, AND BY MARRIED WOMEN.

CONVEYANCES by tenants in tail and by married women may properly be considered by themselves as a separate class of conveyances. For, as regards a tenant in tail, although he has an estate of inheritance, yet by none of the conveyances hitherto examined, unaccompanied by the solemnities to be presently referred to, can any indefeasible interest be granted by him (apart from statute) beyond the period of his own life; and, as regards married women, particular solemnities have also been appointed for the alienation by them of their lands and tenements, other than, of course, their separate estates (*t*).

The law relative to the conveyances of tenants in tail and of married women is now principally contained in the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74). By this statute simpler modes of assurance have been substituted for the old Fines and Recoveries which were in use by tenants in tail, and for the old Fines which were in use by married women; and Fines and Recoveries are, for the future, abolished. It is necessary, however, still to know something of their nature, and also what was their precise operation.

Fines and Recoveries were in the nature of conveyances by matter of record; and, although latterly they were merely fictitious suits, still they were originally actual suits commenced in the Court of Common Pleas, for the recovery of the possession of the land (*u*).

(*t*) 2 Bl. Com. 293; Co. Litt. by Harg. 112, n. (6).

(*u*) 2 Bl. Com. 349, 357.

And, first, of *Fines*.

[Fines were so called, because they put an end, not only to the suit then commenced, but also to all other suits and controversies concerning the same matter (*x*). They were assurances of equal antiquity with the first rudiments of the law itself (*y*) ; and the statute 18 Edw. I., called *Modus levandi Fines*, only declared and regulated the manner in which they should be levied.

Now the mode of levying a fine was as follows: (1) The party to whom the land was to be conveyed commenced an *action* at law against the intended vendor, by suing out a writ denominated, from its initial words, a writ of *præcipe quod teneat conventionem*, the foundation of which was a supposed agreement or covenant (*conventio*), that the defendant should convey the lands to the plaintiff; and for the breach of that agreement the action was brought. The suit being thus commenced, then followed, (2) the *licentia concordandi*, or leave to agree the suit; which leave was readily granted (*z*). (3) Next came the *concord*, or agreement itself, after leave obtained from the court; and this was usually an acknowledgment from the deforciant (*i.e.*, defendant) that the land in question was the plaintiff's. And from this acknowledgment or recognition of the plaintiff's right, the party levying the fine was called the *conusor*, and he to whom it was levied was called the *conusee*. This acknowledgment was made in open court, or else before one of the judges, or (in the country) before two or more commissioners empowered by a special authority, called a writ of *dedimus potestatem ;* and the judges and commissioners were required by the 18 Edw. I. to take care that the conusors were of full age, sound memory, and out of prison. If there were any feme covert among the conusors, she was to be privately examined, whether she did it willingly and freely, or by

(*x*) 2 Roll. Abr. 13.

(*y*) Glan. l. 8, ch. 1; Br l. 5, t. 5, ch. 28, s. 7 ; Plowd. 369; 2 Inst. 511.

(*z*) 5 Rep. 39; 2 Inst. 511; stat. 32 Geo. 2, c. 14.

[compulsion of her husband. By these acts all the essential parts of a fine were completed; and if the conusor died the next moment after the fine was acknowledged, provided it was subsequent to the day on which the writ was made returnable, still the fine would be carried on in all its remaining parts, of which the next is, (4) the *note* of the fine, which was only an abstract of the writ and of the concord, naming the parties, the parcels of land, and the agreement. This by the 5 Hen. IV. c. 14, was to be enrolled of record in the proper office. (5) The *foot* of the fine, or conclusion of it, which usually commenced with the words "*hæc est finalis concordia*," and contained the whole of the proceedings. And of this conclusion, there were indentures made and engrossed at the chirographer's office to be delivered to the conusor and the conusee. This completed the fine at common law; but by the 4 Hen. VII., c. 24, the fine was to be openly and solemnly read and *proclaimed* in court sixteen times, viz., four times in the term in which it was made, and four times in each of the three succeeding terms. And these proclamations (which were afterwards reduced to one in each of the four terms) were indorsed on the back of the record (*a*).

Fines thus levied were of four kinds:—1. The fine *sur cognizance de droit come ceo que il ad de son don.* This was the best and surest kind of fine. By it the deforciant acknowledged in court a former feoffment or gift in possession (*don*) to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record. 2. The fine *sur cognizance de droit tantum.* This fine was commonly used to pass the *reversionary* interest of the conusor. Of such reversion there could be no feoffment (*don*). It was therefore worded in this manner, "that the conusor acknowledges the

(*a*) By 11 & 12 Vict. c. 70, all fines theretofore levied in the Court of Common Pleas are *deemed* to have been levied with proclamations.

["right to be in the conusee, and grants for himself and "his heirs, that the reversion, after the particular estate determines, shall go to the conusee" (*b*). 3. A fine *sur concessit.* This was where the conusor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the conusee an estate *de novo*, usually for life or years, by way of supposed compromise. And this might be done, reserving a rent or the like, for it operated as a new grant (*c*). 4. The fine *sur don grant et render.* This was a double fine, comprehending the fine *sur cognizance de droit come ceo, &c.*, and the fine *sur concessit;* and this was used to create particular limitations of estates (*d*), the conusee, after the right was acknowledged to be in him, granting back again to the conusor, or perhaps to a stranger, some other estate in the premises.]

The effects of a fine were principally as follows:—

1. Like all other conveyances, a fine bound the *parties* thereto, and also all "*privies*," that is, persons deriving title under the parties; and this, whether the fine was levied with proclamations or not (*e*). Even if one of the parties thereto was a married woman, she would still be bound by the fine; and (supposing her husband to concur in it) it would effectually pass any estate, or bar any right of dower, that she might have in the lands therein comprised (*f*). This peculiarity was justified by the circumstance that the court would not allow a fine, affecting a married woman's interest, to pass without privately examining her as to her voluntary consent.

2. A fine with *proclamations* bound not only parties and privies, but even *strangers*, if they failed to put in their claims within the time allowed by law, and were during all that period subject to no legal disability sufficient to excuse their acquiescence (*g*). It was in

(*b*) West, *Symb.* p. 2, s. 95.
(*c*) Burt. *Compend.* 24.
(*d*) *Hunt* v. *Bourne*, (1702) Salk. 339.
(*e*) 2 Bl. Com. 355.
(*f*) 5 Cruise, *Dig.* 82, 154, 156.
(*g*) 2 Bl. Com. 354.

reference to this property of a fine, that rights are said in our books to be barred *by fine* and *non-claim* (*h*); and by the 4 Hen. VII. c. 24 (*i*) when the fine was duly *proclaimed*, the rights of all strangers were bound, unless they made claim by way of action, or lawful entry within five years after proclamation made (*k*), while femes covert, infants, prisoners, persons beyond the seas, and such as were not of sane mind, had a further space of five years allowed to them and their heirs after the death of their husbands, attaining full age, recovering their liberty, returning to England, or being restored to their right mind (*l*). By the 4 Anne, c. 16, the *entry* had to be followed up by an action within one year afterwards. It is to be observed, however, that, in order to bar by non-claim persons who were not parties or privies (*i.e.*, *strangers*), it was necessary that the person levying the fine should be seised of the freehold, either by right or by wrong (*m*): if he had nothing in the land, or if his possession was merely as tenant for a term of years, the fine might have been avoided by pleading *partes finis nihil habuerunt* (*n*). And it is further to be remarked, that persons having only estates in remainder or reversion, were not bound to make claim within five years after the proclamations made, but within five years after their right of entry accrued (*o*).

3. A fine levied by a tenant in tail, with proclamations, barred the issue in tail. Although it had been expressly provided by the Statute *De Donis*, that a fine should have no such effect (*p*), still by the 32 Hen. VIII. c. 36, it was declared, that a fine, when levied with proclamations according to the 4 Hen. VII. c. 24, by any person of full

(*h*) 2 Bl. Com. 354.

(*i*) Co. Litt. by Harg. 121 a, n. (1).

(*k*) 4 Hen. 7, c. 24; *Davies* v. *Lowndes*, (1839) 5 Bing. N. C. 172.

(*l*) 2 Bl. Com. 356.

(*m*) *Davies* v. *Lowndes*, *ubi sup.*

(*n*) Stat. 4 Hen. 7, c. 24; 2 Bl. Com. 356; *Doe* v. *Jones*, (1831) 1 Tyrw. 506.

(*o*) Co. Litt. 372 a.

(*p*) 2 Bl. Com. 355; *Doe* v. *Jones*, *ubi sup.*

age, should be a sufficient bar and discharge for ever against the tenant *and his heirs*, claiming only by force of the entail (*q*), but not against those in remainder or in reversion upon the entail.

4. If the tenant in tail of a corporeal hereditament in possession levied a fine "*sur cognizance de droit come ceo, &c.*," with or without proclamations, it was a *discontinuance* of the entail (*r*). The effect of a discontinuance of the entail was that the issue in tail, and those in remainder or in reversion, lost their right of entry, and were driven to their right of *formedon;* and if the fine was levied with proclamations the issue lost also their writ of *formedon*. But a fine levied by tenant in tail of an incorporeal hereditament, or of an hereditament corporeal in remainder upon an estate of freehold, or in fact of any hereditament which lay in grant at common law, was no discontinuance (*s*), but only created a base fee (*t*). Now, by the Real Property Limitation Act, 1833, no discontinuance takes away any right of entry.

5. A fine "*sur cognizance de droit come ceo, &c.*" levied by a tenant for life in possession, worked a forfeiture, if for a greater estate than the law entitled him to make; and consequently destroyed the contingent remainders (if any) expectant on his life interest (*u*). And the same result, as regards forfeiture, also followed, where such fine was levied by a tenant for a term of years (*x*).

Secondly, of *Recoveries*.

A recovery—or *common* recovery as it was also called—differed from a fine, in that it supposed the suit not immediately compromised, but carried on through

(*q*) Co. Litt. by Harg. 121 a, n. (1).

(*r*) Co. Litt. 327 b; 2 Inst. 335, 336.

(*s*) Co. Litt. 332 a; 5 Cruise, *Dig.* 236.

(*t*) Co. Litt. by Butler, 331, n (1).

(*u*) 2 Bl. Com. 275; 2 Cruise, *Dig.* 361; 5 Cruise, *Dig.* 203, 236.

(*x*) Burt. *Compend.* 318.

all its stages (*y*). Its nature and progress were as follows:—

[Let us suppose Daniel Edwards to have been tenant in tail in possession, and desirous of suffering a common recovery, in order to bar all entails, remainders, and reversions, and to convey the absolute fee simple to Francis Golding. To effect this, Golding as demandant (or plaintiff) sued out against Edwards a writ called a *præcipe quod reddat*. In this writ he alleged that the defendant Edwards had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned out the demandant. Whereupon the tenant appeared, and called upon (or *vouched*) one Jacob Morland, who was supposed to have warranted the title to Edwards; and Edwards prayed that Jacob Morland (*the vouchee*) should defend the title which he had so warranted. Upon this Jacob Morland appeared and defended the title. Whereupon Golding desired leave of the court to *imparl*, or confer with the vouchee in private, which leave was usually granted as a matter of course. And soon afterwards Golding returned to court, but Morland having disappeared or made default, judgment was given for Golding (thenceforth called the *recoveror*) to recover the land in question against the tenant Edwards (the *recoveree*); and Edwards had judgment to recover of Jacob Morland land of equal value, in recompense for the land so warranted by him, and lost by his default. This was called the recompense, or *recovery in value*. But, Jacob Morland having no land of his own, being usually the crier of the court (who from being thus frequently vouched was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding; which land was then absolutely vested in the recoveror, by judgment of law, and seisin thereof was delivered to him by the sheriff of the county. So that this collusive recovery operated merely in the

(*y*) 2 Bl. Com. 357.

[nature of a conveyance in fee simple from Edwards the tenant in tail, to Golding, the purchaser.

The recovery above described was with a single voucher only; but in modern times, it was usual to have a recovery with *double* voucher at the least, by first conveying (where the person whose estate tail was intended to be barred was *immediate* tenant in tail) an estate of freehold to any indifferent person against whom the *præcipe* was brought (which was called making a tenant to the *præcipe*), and such tenant to the *præcipe* vouched the tenant in tail, who vouched over the common vouchee. For if the recovery was had immediately against the tenant in tail, it barred only the estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the land recovered (*z*).

In all recoveries it was necessary that the recoveree should be seised of the freehold in possession (*a*); for all actions to *recover the seisin* (as distinguished from the mere possession) of land were required to be brought against the actual tenant of the freehold. From this doctrine it resulted, that a tenant in tail *in remainder*, expectant on an estate of freehold, could not resort to a recovery to bar the entail, without the concurrence of the person in whom that precedent estate was vested; for, unless the latter joined in the proceedings, there could be no sufficient tenant to the *præcipe*.

The effects of a recovery suffered in due form were these:—

1. It operated to pass to the recoveror an estate in fee simple absolute, and thereby to bar, not only the estate tail itself, but all remainders and reversions expectant thereon, and all conditions to which it had been subject (*b*). But by the 11 Hen. VII. c. 20, no woman,

(*z*) Bro. *Ab.* tit. Taile, 32; *Manxel's Case*, (1564) Plowd. 8.
(*a*) Pigot, 28.
(*b*) 2 Bl. Com. 361.

[after her husband's death, unless with the concurrence of those in reversion, could suffer a recovery of lands entailed on her by her husband, or on her and her husband by any of his ancestors, which was called an estate tail *ex provisione viri* (*c*); and by the 14 Eliz. c. 8, the like provision applied to the estate of a tenant in tail *after possibility of issue extinct*. Moreover, by the 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion was in the king, could bar such estate tail, or the remainder or reversion of the crown (*d*).]

2. A recovery, like a fine, would bind a married woman when she became a party to it with her husband's concurrence; and, as in the case of a fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion (*e*).

3. And lastly, a recovery suffered by a tenant for life worked a forfeiture of the particular estate, and by consequence destroyed all contingent remainders expectant thereon (*f*). It was, however, expressly provided by the 14 Eliz. c. 8, that a recovery so suffered, without the consent of the persons in reversion or *vested* remainder, should as against such persons be utterly void.

[Having now considered fines and recoveries separately, it will be convenient to consider one incident which was common to both species of assurance, viz., the deed to *lead* or to *declare* their *Uses*. For as the fine *sur cognizance de droit come ceo*, &c., conveyed an absolute estate without any limitations to the conusee, and as common recoveries conveyed the like estate to the recoveror, these assurances could not, by themselves, be made to answer the purposes of family settlements. A

(*c*) 5 Cruise, *Dig.* 399.

(*d*) *Perkins* v. *Sewell*, (1768) 1 Bl. Rep. 654; *Duke of Grafton* v. *Birmingham Railway Company*, (1838) 5 Bing. N. C. 27.

(*e*) 5 Cruise, *Dig.* 392.

(*f*) *Doe d. Davies* v. *Galacre*, (1838) 5 Bing. N. C. 609.

[deed limiting the Uses was therefore necessary. This deed, if it was made previous to the fine or recovery, was called a deed to *lead* the Uses, and if subsequent, a deed to *declare* the Uses. As if A. (tenant in tail, with reversion to himself in fee) wished to settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee, he had no power of doing so effectually, while his own estate tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine to (or if there were any intermediate remainders, to suffer a recovery in favour of) E., and directed that the same should enure to the Uses in such settlement mentioned; and the fine when levied, or the recovery when suffered, would enure to the Uses so specified, and no other, these Uses being executed immediately by force of the Statute of Uses. Or, if a fine or recovery were had without any previous settlement, and a deed were afterwards made between the parties, *declaring* the Uses to which the same should be applied; this would be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular Uses. For, by the statute 4 & 5 Anne, c. 3, indentures to declare the Uses of fines and recoveries, made *after* the fines and recoveries had and suffered, were made good and effectual in law; and the fine or recovery was declared to enure to such Uses accordingly.]

We will now proceed to consider the simpler assurances which have, by the Fines and Recoveries Act, 1833, been substituted for fines and recoveries:—

And, first, with reference to the barring of estates tail, the statute provides in substance as follows (*g*):—That every actual tenant in tail (*h*), whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of the lands entailed, for an estate in fee simple absolute, or for any less estate, as against all

(*g*) 3 & 4 Will. 4, c. 74, s. 15.

(*h*) The "actual tenant in tail" is "the tenant of an estate tail which shall not have been barred."

persons claiming under the estate tail, or in respect of any ulterior estate (including the crown). And such disposition may be made by any of the assurances (a will only excepted) which would have sufficed for the purpose, supposing the estate to have been a fee simple absolute; so that the disposition be an actual conveyance, and not one resting in contract only, and so that it be by deed, and enrolled in Chancery (now the Central Office) within six calendar months after execution (*i*). An estate tail in lands of freehold tenure, may consequently now be barred as against the grantor himself, the issue in tail, and all others in remainder, reversion, or other expectancy by any of the conveyances (whether at common law or under the Statute of Uses) which have been discussed in former chapters, always supposing such conveyance to be by deed, and that the deed is duly enrolled within the time limited in that behalf. Supposing the enrolment made in due time (*k*), the deed takes effect from the execution (*l*); but a subsequent deed, if first enrolled, will be entitled to priority (*m*). And a bargain and sale, if enrolled under the Fines and Recoveries Act, need not also be enrolled under the Statute of Inrolments (*n*).

It will be recollected, that though, by a fine, the issue might always be barred at pleasure, a common recovery (which alone barred those in remainder or reversion) was ineffectual when suffered by a tenant in tail not having an estate of freehold in possession, unless he obtained the concurrence of the person in whom the freehold in possession was vested. It was thought desirable to preserve this distinction for the purpose of affording protection to family settlements, in which (we may remember) it is usual to vest in the parent a life estate and to limit estates in remainder to the sons successively in tail, expectant on the determination of such life estate.

(*i*) 3 & 4 Will. 4, c. 74, s. 40, 73.
(*k*) S. 41.
(*l*) S. 74.
(*m*) S. 74.
(*n*) S. 41.

Accordingly, by sect. 34 of the Act, it is provided that no disposition, by a person who is tenant in tail under a settlement shall be effectual under the Act to bar any person but those claiming by force of the entail (that is to say, the issue only), unless it is made with the consent of the "protector of the settlement"; and in the absence of any express provision in the settlement appointing another person to the office of protector, the person who is owner of the first estate of freehold or for years determinable on a life or lives prior to the estate tail is to be protector. This last provision, however, it is material to remark, is expressly confined to the case where the prior estate is created *by the same settlement* as the entail; for where it is constituted by a different assurance, the Act leaves the tenant in tail to the free exercise of his power of disposition. But the following estates, namely,—an estate created by appointment, under a power in the settlement (sect. 1); an estate confirmed or restored by the settlement (sect. 25); an estate resulting to the settlor (sect. 22); and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement (sect. 22), are respectively to be considered as "*created* by the settlement" (*o*).

Where an assurance is executed by a tenant in tail, in such form and with such attendant ceremonies as the statute requires, it passes an indefeasible estate in fee simple absolute, or for life, or years, or otherwise according to the nature of the limitation. If, however, it be executed without the consent of the protector, in a case where a protector exists (*p*), its effect is only to bar the tenant and his issue in tail; and the rights of other persons claiming in expectancy on the estate tail are in that case not affected (*q*). So that an assurance purporting to be in fee simple absolute, will in such latter

(*o*) 3 & 4 Will. 4, c. 74, s. 22.
(*p*) *Bell* v. *Holtby*, (1873) L. R. 15 Eq. 178.
(*q*) Ss. 15, 34.

case convey no more than a base fee determinable on the failure of issue (*r*). It is, however, in the power of the tenant, by afterwards obtaining the consent of the protector, and making a new disposition thereon, or by confirming his former disposition when the protectorship has ceased, to enlarge such base fee into a fee simple absolute (*s*). And in the particular case, when, for want of the protector's consent, such base fee is created, and the immediate remainder or reversion in fee happens also to become united in the same person with the base fee, the latter will, without any such consent or new disposition, enlarge *of itself* into a fee simple absolute (*t*). And by the Real Property Limitation Act, 1874, s. 6, when a person is in possession of a base fee for twelve years after the original tenant in tail might have barred the remainders upon it without the consent of anyone, the base fee is to become a fee simple. Finally, whether the bar effected be general or partial only in its nature, it is to be understood that in all cases it operates without prejudice to the interests of other parties not claiming by force of, or in expectancy upon, the entail. Consequently, it leaves all estates *prior* to the estate tail undisturbed (*u*).

Although, as we have said, the owner of the first estate of freehold is usually the protector of the settlement (*x*), the Act provides specifically, that a lessee at a rent, or anyone entitled as dowress, bare trustee, heir, executor, administrator, or assign (*y*), shall not be deemed the protector. Further, the settlor himself may, in and by the settlement creating the entail, appoint any person or persons *in esse* (not exceeding three in number) to act in the capacity of protector (the tenant of the prior estate being included in the number or not, at the pleasure of the settlor), and may also insert in the settlement a power for the substitution of others, in

(*r*) S. 34.
(*s*) Ss. 19, 35.
(*t*) S. 39.
(*u*) Ss. 15, 19.
(*x*) Ss. 29, 30, 31.
(*y*) Ss. 26, 27, 28, 31.

the event of the death or retirement of those originally nominated (*z*).

The office of protector is intended to be in every case a *personal* one; and therefore a protector does not lose his right to act in that capacity by a transfer of the estate in virtue of which it was acquired, whether that transfer takes place by his own alienation, or by his other act or default (*a*). When the person who would otherwise be protector is incompetent by reason of insanity, the Lord Chancellor (or other person deputed to exercise the royal functions with respect to idiots and lunatics) is to become protector in his stead; and where he who would otherwise be protector is disabled by treason or felony, the office is vested in the Chancery Division, to which latter jurisdiction it is also confided in some other particular cases (*b*). A married woman is competent to be protector; and if the prior estate, in respect of which she becomes so, is held by her to her separate use, she is to hold the office independently of her husband; but where the estate is not so held, she acts in conjunction with him only (*c*). We may remark, too, that the office of protector is in every case of a purely discretionary character; so that the protector is absolutely free from all control in its exercise, and cannot, even by his own previous agreement, fetter his free agency in this respect (*d*). And lastly, with regard to the consent which it is thus absolutely in his power to grant or to withhold, that consent may either be given by the same instrument which makes the disposition, or by a separate one to be executed on or before the same day with the other, and to be duly enrolled: and when once given, the consent cannot be revoked (*e*).

It is not only on *legal* estates that an assurance under the statute in question will operate, nor in respect of

(*z*) S. 32.
(*a*) S. 22.
(*b*) 3 & 4 Will. 4, c. 74, ss. 33, 48.
(*c*) Ss. 24, 45, 79.
(*d*) Ss. 36, 37.
(*e*) Ss. 42, 44, 46.

these only that its operation was required. It is indeed generally true, that an *equitable* estate will pass by any instrument sufficient to indicate the intention of the grantor; but such estates when entailed are exceptions to this rule, and cannot be transferred except by the appropriate methods. It was in fact the practice, before the statute passed, to convey entailed equitable interests through the medium of fines and recoveries (*f*); which, though always transacted in a common law court, were considered in equity as legitimate assurances for the purpose. Thus, if lands were given to the use of A. in fee, in trust for B. in tail, with remainder over, a fine levied or recovery suffered by B. was recognized in the courts of equity as a bar of his equitable estate, that is, a bar to the extent to which the same assurance would have operated on a legal estate of the same description (*g*). And by the Fines and Recoveries Act, 1833, a similar effect now belongs to the substituted assurance, the word "estate" being used throughout the Act "to express an estate in equity, as well as at law" (*h*).

The statute is also framed to take effect not only on actual entails, but upon money liable to be converted into land; as where trustees are directed to invest money in land, which, when purchased, is to be settled in tail. For, with respect to trusts of this description, the statute enacts, that its provisions shall be applicable (so far as circumstances will permit) to the monies so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust; but any disposition of such monies by the tenant in tail must be made, not by a conveyance appropriate to the passing of the realty, but by a deed of assignment inrolled in Chancery (now the Central Office) within six calendar months after the execution (*i*).

(*f*) 5 Cruise, *Dig.* 301, 461.

(*g*) *Doe* d. *Cadogan* v. *Ewart* (1838) 7 A. & E. 636.

(*h*) 3 & 4 Will. 4, c. 74, s. 1.

(*i*) S. 71.

Where an infant is tenant in tail in possession, and the Court makes a vesting order under the Trustee Act, 1893 (*k*), or appoints some person to convey the estate of the infant, the effect is to bar the estate tail and remainders over; for the order vests the land for such estate as the infant, if of full age, could convey (*l*).

Second, with reference to the binding and assurance of the estates of married women, the statute provides, generally, that a married woman shall be as competent as if she were a feme sole, to dispose by deed of lands of any tenure, or of money subject to be invested in the purchase of lands, and also to extinguish any estate which she, (or she and her husband in her right,) may have, or any power which may be vested in her, in regard to lands or to money of that description; provided always that her husband shall concur in the deed (*m*), and provided also that, upon the execution thereof, or at some time afterwards, she shall produce the deed and acknowledge it before the proper authorities (*n*). The acknowledgment may be taken either before one of the judges of the High Court (*o*), or before one of the commissioners from time to time appointed for that purpose (*p*), or before a judge of a county court (*q*). It is the duty of such authorities, before they receive her acknowledgment, to examine the woman apart from her husband, in order to ascertain her free and voluntary consent; and in the absence of such consent, the acknowledgment is to be rejected, and the deed becomes void, as far as relates to her execution (*r*). Supposing the acknowledgment, on the other hand, to be received, a memorandum of the fact used to be written on the foot or margin of the deed; and a certificate thereof

(*k*) 56 & 57 Vict. c. 53, ss. 31, 32, 50.

(*l*) *Faber* v. *Montagu*, [1896] 1 Ch. 549; and see *Powell* v. *Matthews*, (1855) 1 Jur. (N.S.) 973.

(*m*) 3 & 4 Will. 4, c. 74, s. 77.

(*n*) S. 79.

(*o*) S. 80.

(*p*) Conveyancing Act, 1882, s. 7.

(*q*) County Courts Act, 1888, s. 184.

(*r*) 3 & 4 Will. 4, c. 74, s. 80.

used to be also drawn up and signed on a separate piece of parchment, and verified by affidavit. The certificate and affidavit were then filed of record in court, and, until so recorded, the deed had no effect as regards the party under coverture (*s*); but, when the record was complete, it operated to affect her interest, as from the time when it was acknowledged. But now, as regards the deeds of married women executed after the 31st December, 1882, and requiring to be acknowledged by them, it appears that the memorandum of acknowledgment simply is written at the foot or in the margin of the deed; and the matter is therewith complete, no certificate or affidavit, or any recording of either, being required (*t*). When the object of the disposition is to bar the estate *tail* of a married woman, the same course of proceeding is to be observed as in the case of other tenants in tail; and the ceremony of acknowledgment is superadded (*u*).

The court is also empowered by order, in a summary way upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense (in every case where it shall appear reasonable to do so) with the concurrence of the husband in her acts, whether in barring an estate tail, or in executing a deed for any other purpose (*x*), saving nevertheless such rights as the husband may possess independently of the Act (*y*).

The need of separate acknowledgment arises only where the husband's consent is necessary to enable the wife to convey. Accordingly, where the property is held by trustees for her separate use (*z*), or is her separate estate under the Married Women's Property Act, 1882, she can convey as a feme sole (*a*).

(*s*) *Jolly* v. *Hancock*, (1852) 7 Exch. 820.

(*t*) Conveyancing Act, 1882, s. 7.

(*u*) 3 & 4 Will. 4, c. 74, ss. 40, 79.

(*x*) S. 91; *Goodchild* v. *Dougal*, (1877) 3 Ch. D. 650.

(*y*) 3 & 4 Will. 4, c. 74, s. 91; *Fowke* v. *Draycott*, (1885) 29 Ch. D. 996.

(*z*) *Pride* v. *Bubb* (1872) L. R. 7 Ch. 64.

(*a*) 45 & 46 Vict. c. 75, and see *Re Harkness and Allsopp*, (1896) 2 Ch. 358.

CHAPTER XX.

OF THE CONVEYANCE BY DEVISE.

THE next conveyance to be considered is that by *devise* or will; and this operates from the death of the testator, his will being merely *ambulatory* during his life,—"*omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem*" (*b*).

[According to the old Roman law, a will or testament was "*voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit*" (*c*), which may be thus rendered into English: "the legal declaration of a man's intentions which he wills to be performed after his death." It is called *sententia*, to denote the circumspection and prudence with which it is supposed to be made; it is *voluntatis nostræ sententia* because it declares the testator's intention, or emphatically his *will*; it is *justa sententia* in that it is drawn, attested, and published, with all due solemnities and forms of law; it is *de eo quod quis post mortem suam fieri velit*, because it is of no force until after the death of the testator (*d*). The term *codicil* signifies an instrument made subsequently to the will, and by which the dispositions of the will are added to, taken from, or otherwise altered; and it is like the will in most respects, of which indeed it is considered as forming a part. So that, whatever may be laid down as law regarding a will, may be taken generally as applicable also to every codicil thereto (*e*).

The right to make a will is merely a creature of the

(*b*) Co. Litt. 112.
(*c*) *Dig.* 28, 1, 1.
(*d*) 2 Bl. Com. 499.
(*e*) *Anderson* v. *Anderson*, (1872) L. R., 13 Eq. 381; *Green* v. *Tribe*, (1878) 9 Ch. D. 231.

civil state, which has permitted it or not according as political circumstances have appeared to dictate; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every country. In our own country, both real and personal estate have long been capable of transmission by will; but for the present we shall confine ourselves to real estate and to lands of freehold tenure. And we shall consider, I. The power of devise itself; II. The solemnities which attend the execution, revocation, and revival of wills; III. The rules of construction to which devises are subject; and IV. The operation of devises in conveying or limiting real estate.

I. [As to the power of devising. It seems that, at a period antecedent to the Conquest, lands were devisable in this country (*f*). Upon the introduction of the military tenures, however, a restraint on devising lands naturally followed, as a branch of the feudal doctrine of non-alienability without the consent of the lord. So that *after* the Conquest, no estate greater than for term of years could be disposed of by testament (*g*); except only in Kent and in some antient boroughs, and in a few particular manors, where the old Saxon immunities continued, by special indulgence, to subsist (*h*). And though the feudal restraint on alienation by deed vanished very early, yet the restraint on alienation by will continued for some centuries after (*i*). When Uses were invented, they began to be devised (*k*). But when the Statute of Uses (1536) was passed, the legal estate became annexed to the Use, and rendered it incapable of being devised. This led to the passing some five years later of the *Statute of Wills*, 32 Hen. VIII. c. 1 (explained by 34 & 35 Hen. VIII. c. 5), which authorized all persons being seised in fee simple (except femes covert, infants,

(*f*) Wright, *Ten.* 172.
(*g*) 2 Inst. 7.
(*h*) Litt. s. 167; Co. Litt. 111. *Vide* Rob. *Gavel.* 235.
(*i*) Glan. lib. 7, ch. 1.
(*k*) Plowd. 414; Gilb. *Devises*, 7.

[idiots, and persons of non-sane memory), by will in writing to devise to any other person, except to bodies corporate, *two-thirds* of their lands, tenements, and hereditaments held in chivalry, and the *whole* of their lands held in socage. This partial power of devising lands became, of course, complete upon the alteration of tenures effected by the statute of Charles the Second, whereby *chivalry* was converted into *socage* (*l*). And a devise under these statutes took effect, not only upon legal, but also upon equitable estates. But the devise was inoperative, unless the land belonged to the testator at the time of making his will; so if the testator was desirous of including after-acquired lands in his testamentary dispositions, a new will or codicil, or a re-execution of the existing will, was required for the purpose.]

Such was the power of devising as it existed at the passing of the Wills Act, 1837. Now, under that Act, any person (being of full age) is able to dispose by will of all real and personal estate, legal or equitable, to which he or she shall be entitled at the time of his or her death, and which, but for such disposition, would pass to his or her heir at law. And the Act expressly extends this power of disposition to an estate held *pur auter vie*, and to any contingent, executory, or other future interest, and even to a right of entry upon land, a class of interest previously regarded as incapable of being devised (*m*). The power is also expressly extended to after-acquired property, by a provision that all real estate, to which the testator is entitled at the time of his death, shall pass by his will, notwithstanding that he may become entitled to the same, subsequently to the execution of the will (*n*). And, there being no exception in the Act with regard to

(*l*) 12 Car. 2, c. 24.

(*m*) *Goodright* v. *Forrester*, (1808) 8 East, 552; *Pemberton* v. *Barnes*, [1899] 1 Ch. 544.

(*n*) 7 Will. 4 & 1 Vict. c. 26, s. 3; *Marston* v. *Roe*, (1838) 8 A. & E. 14.

corporations, a devise even to a body corporate is now valid, subject to the Statutes of Mortmain, by which corporations are required to obtain the crown's licence, to enable them to become the *holders* of land. On the other hand, the Act contains an express exception to the power of devising, in reference to married women and infants, the first being only allowed to make a valid disposition in cases in which they might have done so before the Act (*o*), and minors being made wholly incompetent. To these exceptions we must of course understand the exception to be tacitly added which would be introduced by the general rules of law, in respect of idiots, insane persons, and others labouring under personal incapacity to convey in any manner whatever (*p*). As regards married women, they might always dispose of their separate real estates by will. They might always too, in the execution of a power of appointment, dispose of real estates by will. And we shall hereafter see, that, under the various Acts relating particularly to the separate estates of married women (*q*) they now have, as regards their separate estates, the fullest powers of devise, as indeed of alienation generally.

II. [The solemnities which attend the execution, revocation, and revival of a will. When the old Statute of Wills (32 Hen. VIII. c. 1) for the first time gave efficacy to devises of realty, innumerable frauds and perjuries were introduced. This need occasion no surprise, for at that time bare notes, in the handwriting of the party, became good wills within the statute, if only *published* by him as such; that is, if only declared by the testator to be intended to operate as his last

(*o*) 7 Will. 4 & 1 Vict. c. 26, ss. 7, 8; *Forse and Hembling's Case*, (1588) 4 Rep. 60 b; *Pride* v. *Bubb*, (1872) L. R., 7 Ch. App. 64.

(*p*) *Smith* v. *Tebbitt*, (1867) L. R. 1 P. & D. 398; *Banks* v. *Goodfellow*, (1870) L. R., 5 Q. B. 549.

(*q*) Married Women's Property Act, 1893, amending Married Women's Property Act, 1882, and extending s. 24 of the Wills Act to the will of a married woman.

[will and testament (*r*). And except *publication*, no ceremony was then essential to a written will of personalty (*s*); while the old Statute of Wills prescribed no particular solemnity in reference to devises of real estate, except that it required the will to be *in writing*. To remove all which opportunities for fraud, the Statute of Frauds (29 Car. II. c. 3) directed, amongst other things, that devises of lands and tenements should not only be in writing, but should be signed by the testator, or by some other person for him in his presence and by his express direction (*t*); and should also be subscribed, in his presence, by three credible witnesses (*u*). And a solemnity nearly similar was, by the same Act (sect. 6), made requisite for *revoking* devises (*x*); though devises might also be revoked by the burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent, by any other person, if done *animo revocandi* (*y*): as they might also be, implicitly, by any new modification of the interest of the devisor in the estate devised (*z*), or by such a great and entire alteration in circumstances as arose from his marriage and the birth of a child (*a*), or, in the case of a woman, by her marriage simply (*b*).

In the construction of the Statute of Frauds, it was settled, that the testator's name, written with his own hand at the beginning of the will, as, "I, John Mills, do make this my last will and testament," was a sufficient signing, if intended as such by the testator. It was also determined, that though the witnesses must all see the

(*r*) 2 Bl. Com. 376.

(*s*) *Doe* v. *Sir F. Burdett*, (1836) 4 A. & E. 14.

(*t*) *Baker* v. *Denning*, (1838) 8 A. & E. 94.

(*u*) *Roberts* v. *Phillips*, (1855) 4 Ell. & Bl. 450.

(*x*) *Swinton* v. *Bailey*, (1876) 1 Ex. D. 110.

(*y*) *Andrew v. Motley*, (1852) 12 C. B. (N.S.) 514.

(*z*) *Sparrow* v. *Hardcastle*, (1754) 3 Atk. 802.

(*a*) *Re Cadywold*, (1863) 1 Swab. & Trist. 34; 2 Bl. Com. 376.

(*b*) *Forse & Hembling's Case*, (1588) 4 Rep. 60 b.

[testator sign, or at least see him acknowledge his signature, yet they need not all be present at the same time (*c*), though they must all subscribe their names *in his presence*, lest by any possibility they should mistake the instrument (*d*). And the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor a creditor by simple contract, where the legacies and debts were charged on the real estate, to be a competent witness to the devise (*e*). This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present at the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts, every disposition in the will, so far as it related to real property, would have been utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credibility of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit, (like that of all other witnesses,) to be considered on a view of all the circumstances, by the court and jury before whom such will should be contested (*f*).]

Such is still the law as to the execution and attestation

(*c*) Freem. 486; 2 Ch. Ca. 109; Prec. in Ch. 185.

(*d*) *Longford* v. *Eyre*, (1721) 1 P. Wms. 740.

(*e*) *Holdfast* v. *Dowsing*, (1749) Stra. 1253.

(*f*) *Cresswell* v. *Cresswell*, (1868) L. R., 6 Eq. 69.

required for will made before 1st January, 1838 (*g*) ; but the provisions previously in force are, by the Wills Act, 1837, repealed as to all wills made *on or after* that date (*h*), or re-executed or by codicil revived after that date (*i*). And it is now enacted (*k*), that no will (whether operating on real or on personal estate, or on both) shall be valid (*l*), unless it be in writing and signed at the foot or end thereof (*m*) by the testator or some other person, in his presence, and by his direction, such signature being also made or acknowledged by him, in the presence of *two* or more witnesses present at the same time, and such witnesses attesting and subscribing the will in his presence (*n*). Where these requisites, however, are complied with, no other are now imposed by law; and the statute expressly enacts that no *publication*, other than that which is implied in the execution so attested, shall in future be necessary. The statute has also expressly enacted, that wills exercising powers of appointment shall be attested in the same manner, and being so attested shall be sufficiently attested (*o*). The former provisions, also, with respect to the competency of witnesses having an interest, are repealed as to wills taking effect under the new law ; and the new enactments on this subject are, first, that the incompetency of any attesting witness shall not invalidate the will (*p*) ; second, that any beneficial gift

(*g*) 7 Will. 4 & 1 Vict. c. 26, s. 34.

(*h*) Sect. 2.

(*i*) *Croker* v. *Hertford*, (1844) 4 Moore's P. C. Cases, 339 ; *Green* v. *Tribe*, (1878) 9 Ch. D. 231.

(*k*) Ss. 9, 11.

(*l*) With regard, however, to wills of *personalty* made by *soldiers* or *seamen* on actual service and the distribution of their effects when intestate, see Statute of Frauds, s. 22 ; Navy and Marines Wills Acts, 1865 and 1897 ; *In the Goods of Spratt*, [1897], P. 28 ; and (as regards the preferential payment of regimental debts) 56 & 57 Vict. c. 5.

(*m*) 15 & 16 Vict. c. 24 ; *Re Archer*, (1871) 2 P. & M. 252 ; *Re Anstee*, (1893) P. 283.

(*n*) *Hindmarsh* v. *Charlton*, (1862) 8 H. L. C. 160 ; *Wyatt* v. *Berry*, [1893] P. 5.

(*o*) 7 Will. 4 & 1 Vict. c. 26, s. 10. *In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442 ; *Barretto* v. *Young*, [1900] 2 Ch. 339.

(*p*) 7 Will. 4 & 1 Vict. c. 26, s. 14.

or appointment by the will to an attesting witness, or to the husband or wife of an attesting witness, (except a charge for payment of debts,) shall be void, and the evidence of the witness admissible (*q*); third, that where land is charged by the will with payment of debts, and the creditor (or husband or wife of the creditor) is an attesting witness, such witness shall nevertheless be competent (*r*); fourth, that no person shall be incompetent as a witness on account of his being an executor of the will (*s*).

As to revocation, also, the former law was altered by the Wills Act, 1837. By sect. 18, every will is revoked by *the marriage* alone, either of a testator or of a testatrix, unless such will was made in exercise of a power of appointment vested in him or her, and the estate would not have passed, in default of appointment, to his or her representatives. On the other hand, by sect. 19, no will is to be revoked by any presumption of an intention to revoke, raised by any alteration in circumstances or otherwise, except only by the circumstance of marriage (*t*); and, by sect. 23, no alienation of the property devised will prevent the devise taking effect on any estate which the testator is entitled to dispose of at his death. A revocation may, however, take place by the execution of another will or of a codicil, or of some writing of revocation executed like a will, or by the burning, tearing, or other destruction of the original will, with the intention of revoking it, by the testator or by some person in his presence and by his direction (*u*). And with respect to obliterations or other alterations made after execution, it is provided, by sect. 21, that they are to have no effect (where the original meaning can still be deciphered) (*x*) unless executed with the same ceremonies as the will itself; though it will be sufficient if the signature of the testator, and the

(*q*) Sect. 15.
(*r*) Sect. 16.
(*s*) Sect. 17.
(*t*) *De Pontes* v. *Kendall*, (1862) 10 W. R. 69.
(*u*) Sect. 20; *Cheese* v. *Lovejoy*, (1877) 2 P. D. 251; *Bell* v. *Fothergill*, (1871) L. R. 2 P. & M. 148.
(*x*) *Re Gilbert*, [1893] P. 183.

subscription of the witnesses, be made opposite or near the part altered, or at the foot or end of some memorandum written on the will, and referring to the alterations. No letter or memorandum not so signed and witnessed can be regarded (*y*). And, by sect. 22, when a will is once revoked, it is not to be *revived* otherwise than by re-execution of the original, or by a codicil duly executed and shewing an intention of revival (*z*).

III. The rules of construction to which devises are subject. These rules are in great measure the same rules as apply to conveyances by deed (*a*); but as in making a will a party is supposed to be *inops consilii*, there are instances in which the law will carry his intended limitations into effect, though the words used would in a deed be insufficient or improper for the purpose (*c*). Thus, it has always been held, that a fee might be conveyed by devise without legal words of inheritance, and an estate tail without words of procreation (*d*), provided that other words are used sufficient to indicate the intention (*e*); though in a conveyance by deed, the case used to be otherwise. [So an estate may pass under a will by mere implication, without any express words to direct its course; *e.g.*, where a man devised lands to his heir-at-law, after the death of his wife, here, though no estate was given to the wife in express terms, yet she was held to have an estate for life by implication (*f*). For the intent of the testator was clear to postpone the heir until after her death; and if she did

(*y*) *McCormick* v. *Grogan*, (1879) L. R. 4 App. Ca. 82; *Singleton* v. *Tomlinson*, (1878) L. R. 3 App. Ca. 404.

(*z*) *In re the Goods of Hodgkinson*, [1893] P. 339; *In the Goods of Chilcott*, [1897] P. 223.

(*a*) *Clayton* v. *Lord Nugent*, (1845) 13 M. & W. 200; and *vide sup.*, p. 296.

(*c*) Co Litt. by Butler, 272 a, n. (1): *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304; *Hamilton* v. *Ritchie*, [1894] A. C. 310.

(*d*) *Crumpe* v. *Crumpe*, [1900] A. C. 127.

(*e*) *Lloyd* v. *Jackson*, (1867) L. R. 2 Q. B. 269.

(*f*) *Pybus* v. *Mitford*, (1674) 1 Vent. 376.

[not take it, nobody else could. So also, where the devise was of Blackacre to A. in tail, and of Whiteacre to B. in tail, and if they both died without issue, then to C. in fee, here it was held that A. and B. had *cross-remainders* by implication; so that, on the failure of the issue of either, the other or his issue would take the whole, and C.'s remainder over would be postponed till the issue of both had failed (*g*). But where such implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible implications (*h*).] There is also this difference between deeds and wills in point of construction, that, supposing a will to contain two inconsistent clauses, the one which comes last in order shall prevail; while in a deed the preference is, as we have seen, due to that which comes first (*i*).

A devise also is subject to a less strict rule than a conveyance by deed, in respect of the description of the thing granted. Thus, if I convey my house by deed, describing it as a house and not as land, we have seen that no land can pass, except the orchard, garden, and curtilage; but the question what shall pass by the *devise* of a house (or of a house "with the appurtenances") is purely a question of intention, to be determined, like other points of construction, by the tenor of the whole will. And a devise in either form may, under special circumstances, have the effect of passing even adjacent land or buildings (*k*).

There are also some particular points of construction with regard to devises, which have been established by parliamentary enactment. For the former state of the law upon these points, as settled by judicial decisions, having been deemed unsatisfactory, it was thought fit, in

(*g*) Freem. K. B. 483.

(*h*) *Holmes* v. *Willett*, (1680); *Gardner* v. *Sheldon*, (1671); Vaugh. 259.

(*i*) *Doe* d. *Spencer* v. *Pedley*, (1836) 1 M. & W. 677; *Re Bywater*, (1881) 18 Ch. D. 17.

(*k*) *In re Portal & Lamb*, (1885) 30 Ch. D. 50.

the Wills Act, 1837, to regulate them for the future upon different principles, that is to say, in the respects following:—

1. As the dispositions made by a testator cannot take effect, and are not intended to take effect, till after his death, it has often been a question whether in his description of the property devised, he shall be considered as referring to the state of things which exists when he executes his will, or to that which may exist at the time of his death. As to bequests of personal estate, the rule has always been, that the will speaks as at the time of death: but in devises of the realty, the opposite construction formerly obtained, the will being held to speak, in general, as at the time of its execution(*l*). The Wills Act, 1837, has now assimilated the construction of *devises* upon this point to that of *personal bequests*; for by section 24 it provides, that "every will shall be construed, "with reference to the real estate and personal estate "comprised in it, to speak and take effect as if it had "been executed immediately before the death of the "testator, unless a contrary intention shall appear by "the will" (*m*).

2. Though an estate in fee was always allowed to pass by devise, without apt words of inheritance, provided there were other expressions to show the testator's intention to confer a fee, yet, prior to the Wills Act, 1837, a long train of judicial decisions had established that a mere devise of a house or land would not suffice to indicate that intention, but would confer only an estate for life(*n*). Thus, if I were seised *in fee* of a house at A., and devised the same to B., adding either the words *and his heirs*, or equivalent words, expressive of an intention that he should take my whole estate therein, the house

(*l*) *King* v. *Bennett*, (1838) 4 M. & W. 36.

(*m*) *Castle* v. *Fox*, (1871) L. R. 11 Eq. 542; *Everett* v. *Everett*, (1877) 6 Ch. D. 122. *In re Champion*, *Dudley* v. *Champion*, [1893] 1 Ch. 101; *Higgins* v. *Dawson*, [1902] A. C. 1.

(*n*) *Pickwell v. Spencer*, (1871) L. R., 6 Exch. 190.

would pass to him, in either case, in fee; but if I devised to him such house, without adding *and his heirs*, or using such other equivalent words as above mentioned, he would take an estate in it for his life only (*o*). This rule had always given much dissatisfaction, as establishing a construction contrary to that which common sense presumes to be the real intention of the party. Now by sect. 28 of the Wills Act, 1837, it has been provided, that "where any real estate shall be devised to any person "without any words of limitation, such devise shall be "construed to pass the fee simple, or other the whole "estate or interest which the testator had power to "dispose of by will, in such real estate, unless a contrary "intention shall appear by the will."

3. In devises to *trustees*, it had been a general rule prior to the Wills Act, 1837, that, though no words of inheritance were used in the limitation to them, yet they should take such an estate (even to the extent of the whole fee) as might be necessary to enable them to perform the trusts; but the question often arose, whether in particular instances they would take the fee, or a less estate, and if the fee, whether it would be determinable or not when the trusts were satisfied. But by s. 30 of the Wills Act, 1837, it is now provided, that "where any "real estate (other than or not being a presentation to a "church) shall be devised to any trustee or executor, "such devise shall be construed to pass the fee simple, "or other the whole estate or interest which the testator "had power to dispose of by will, in such real estate, "unless a definite term of years, absolute or determin-"able, or an estate of freehold, shall thereby be given to "him expressly, or by implication." And further (by sect. 31), that "where any real estate shall be devised to "a trustee, without any express limitation of the estate "to be taken by such trustee, and the beneficial interest "in such real estate, or in the surplus rents and profits

(*o*) *Hill* v. *Brown*, [1894] A. C. 125.

" thereof, shall not be given to any person for life—or " such beneficial interest shall be given to any person for " life, but the purposes of the trust are to continue " beyond the life of such person—such devise shall be " construed to vest in such trustee the fee simple, or " other the whole legal estate which the testator had " power to dispose of by will, in such real estate, and not " an estate determinable when the purposes of the trust " shall be satisfied (*p*)."

4. If, in the interval between the execution of a will and the death of the testator, one of the objects of his bounty should die, the devise will, by the general rule of law, *lapse*, that is, fail, and take no effect. This will be the case even though the devise should be to the devisee and *his heirs*, or to him and *the heirs of his body*. And when a devise lapses the subject-matter of it will either fall into the residue, when the will contains a residuary devise, or, where there is no such devise, be undisposed of by the will. This rule, where an estate in *tail* had been given to one who died and left children, was attended with peculiar hardship; for if there were a devise to A. and the heirs of his body, and he died before the testator, the gift was void, even though he left issue. So if a testator gave his property among his own children, and one of them died before him, leaving issue, such issue would take nothing under the will, though the probability was, that this consequence could not have been intended. It is true that a testator had it always in his power to make a new disposition in favour of the children of a deceased devisee; but either from negligence or ignorance of the law, or from other accidental causes, this was often omitted. An alteration of the law itself, as applicable to cases of this description, being therefore desirable, the Wills Act, 1837, by sect. 32, has provided, that "where any person to whom any real estate

(*p*) *Freme* v. *Clement*, (1881) 18 Ch. D. 514; *Re Adam and Perry's Contract*, [1899] 1 Ch. 544.

" shall be devised for an estate tail, or an estate in *quasi* " entail, shall die in the lifetime of the testator, leaving " issue who would be inheritable under such entail, and " any such issue shall be living at the time of the death " of the testator, such devise shall not lapse, but shall " take effect as if the death of such person had happened " immediately after the death of the testator, unless a " contrary intention shall appear by the will." And further, by sect. 33, that "where any person, being a " child or other issue of the testator, to whom any real " or personal estate shall be devised or bequeathed for " any estate or interest not determinable at or before the " death of such person, shall die in the lifetime of the " testator, leaving issue, and any such issue of such " person shall be living at the time of the death of the " testator, such devise or bequest shall not lapse, but " shall take effect as if the death of such person had " happened immediately after the death of the testator, " unless a contrary intention shall appear by the " will" (*q*). In addition to which enactments, and in connection with the subject of lapse, we may notice this further provision (sect. 25), introductory of a new rule, in cases where a lapse occurs, namely, that " unless a " contrary intention shall appear by the will, such real " estate or interest therein as shall be comprised or " intended to be comprised, in any devise in such will " contained, which shall fail or be void by reason of the " death of the devisee in the lifetime of the testator, or " by reason of such devise being contrary to law, or " otherwise incapable of taking effect, shall be included " in the *residuary devise* (if any) contained in such " will" (*r*).

(*q*) *Eager* v. *Furnivall*, (1881) 17 Ch. D. 115; *Stansfeld* v. *Stansfeld*, (1880) 15 Ch. D. 84.

(*r*) *Crawshaw* v. *Crawshaw*, (1880) 14 Ch. D. 817; *Hetherington* v. *Longrigg*, (1880) 15 Ch. D. 635; *Carter* v. *Haswell*, (1857) 26 L. J. Ch. 576 at p. 577; *Re Mason*, *Ogden* v. *Mason*, [1901] 1 Ch. 619.

5. Under a devise by a testator, having leasehold estate only, of "all my lands and tenements," a lease for years has always been allowed to pass, for there would otherwise be nothing for the will to operate upon; but if a testator, using such words, had lands in fee, as well as leaseholds, at the time, the lands in fee only would pass (*s*). It is now, however, provided by the Wills Act, 1837, sect. 26, that "a devise of the land of the testator, or "of the land of the testator in any place, or in the occupa- "tion of any person mentioned in his will, or otherwise "described in a general manner, and any other general "devise which would describe a customary copyhold or "leasehold estate, if the testator had no freehold estate "which could be described by it, shall be construed to "include the customary copyhold and leasehold estates "of the testator or his customary copyhold and leasehold "estates, or any of them, to which such description "shall extend, as the case may be, as well as freehold "estates, unless a contrary intention shall appear by the "will" (*t*).

6. In like manner, where a party, having an *estate* in lands, (being lands which he is competent to devise,) is also entitled, by virtue of a *power* conferred on him for the purpose, to appoint other lands by his last will and testament, it was the rule, prior to the Wills Act, 1837, that a general devise of his lands would operate only on those in which he had the estate, and would not affect those subject to the power; though it was otherwise if he expressly referred to the power, or if it appeared by other circumstances (as by his having no estate for the will to work upon), that he intended the subject of the power to pass (*u*). And such is still the general rule where the power is special, and to be exercised only in favour of

(*s*) *Rose* v. *Bartlett*, (1610) Cro. Car. 293.

(*t*) *Prescott* v. *Barker*, (1874) L. R. 9 Ch. App. 174; *Butler* v. *Butler* (1885), 28 Ch. D. 66; *Re Guyton and Rosenberg's Contract*, [1901] 2 Ch. 591.

(*u*) *Denn* v. *Roake*, (1826) 5 B. & C. 731.

particular individuals or classes of person (*x*). But where the power is *general*, and enables the testator to appoint to any person that he pleases (which amounts in substance to ownership), the law is now altered by the Wills Act, 1837, which provides (by sect. 27), that "a general devise of the "real estate of the testator, or of the real estate of the "testator in any place, or in the occupation of any person "mentioned in his will, or otherwise described in a "general manner, shall be construed to include any real "estate, or any real estate to which such description shall "extend as the case may be, which he may have power to "appoint in any manner he may think proper, and shall "operate as an execution of such power, unless a contrary "intention shall appear by the will,"—a principle of construction which is expressly made applicable also to personal estate (*y*).

7. By a rule of legal interpretation, at variance with the common apprehension of mankind, and founded upon reasons of a purely technical description, it had long been settled law, that the words *dying without issue* (as where an estate of freehold or leasehold was devised to A., and *upon his dying without issue*, then over to B.), in general imported an *indefinite* failure of issue, that is, a failure not merely at the death of the party whose issue were referred to, but at any subsequent period, however remote (*z*). But by the Wills Act, 1837, such words were directed, for the future, to receive a more natural exposition, it being enacted (by sect. 29), that, "in any devise "or bequest of real or personal estate, the words 'die "'without issue,' or 'die without leaving issue,' or 'have "'no issue,' or any other words which may import either "a want or failure of issue of any person in his lifetime

(*x*) *Cadell* v. *Willcocks*, [1898] P. 21; *Re Mayhew, Spencer* v. *Cutbush*, [1901] 1 Ch. 677.

(*y*) *In re Marsh, Mason* v. *Thorne*, (1889) 38 Ch. D. 630; *Phillips* v. *Cayley*, (1890) 43 Ch. D. 222; *Airey* v. *Bower*, (1887) L. R. 12 App. Cas. 263; *In re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529.

(*z*) Fearne by Butler, pp. 478, 480.

"or at the time of his death, or an indefinite failure of his "issue, shall be construed to mean a want or failure of "issue in the lifetime or at the death of such person, and "not an indefinite failure of his issue, unless a contrary "intention shall appear by the will, by reason of such "person having a prior estate tail, or of a preceding gift, "being without any implication arising from such words, "a limitation of an estate tail to such person or issue, or "otherwise" (*a*). But the provision does not extend "to "cases where such words as aforesaid import if no issue "described in a preceding gift shall be born, or if there "shall be no issue who shall live to attain the age or "otherwise answer the description required for obtaining "a vested estate by a preceding gift to such issue."

IV. [As to the operation of a devise in conveying and limiting real estate. A will, in regard to its operation on real estate, is considered not so much in the nature of a testament, as of a *conveyance* declaring the Uses to which the land shall be subject (*b*); with this difference, however, that in other conveyances the *subscription* of the witnesses is not, in all cases, essential to the validity of the deed, though it is a prudent precaution (and one which in practice is invariably observed), in order to assist their memory when living, and to supply their evidence when dead. But in a devise, such subscription is made absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up until after the death of the devisor.]

By a devise, therefore, estates may be limited with the same effect as by a conveyance operating under the Statute of Uses (*c*). Thus, a man may effectually devise not only an estate in possession, (that is, in possession immediately on the death of the testator, when the will first takes effect,) or in remainder, but also a freehold *in futuro*, or a

(*a*) *Dawson* v. *Small*, (1874) L. R., 9 Ch. App. 651; *Re Edwards* (1894) 3 Ch. 644; *Crumpe* v. *Crumpe*, [1900] A. C. 127.

(*b*) *Wyndham* v. *Chetwynd*, (1757) Burr. 429.

(*c*) 2 Bl. Com. 334.

fee upon a fee, either defeasibly or alternatively—all which limitations (as we have seen) may be effectually made by way of executory use, though not in a conveyance at the common law. So a man may devise to his wife—as he may convey to her by way of use—though his conveyance to her was inoperative at common law (*d*). Yet, though a devise is considered to be in the nature of a conveyance declaring uses, Uses are often expressly introduced into wills; and it has been the practice to introduce them in the same form as in conveyances under the Statute of Uses. But it has been doubted whether that statute has any effect in the case of a devise (*e*). For though where Uses are expressly and formally declared by the will, it may often be inferred that the testator had the statute in view, and intended the conversion of the Use into legal estate, according to its known mode of operation; yet it is rather by force of his *intention*, than of the statute itself, that the legal estate, in such cases, would be deemed to pass (*f*).

A devise by which any future estate is limited contrary to the rules of the common law is called an *executory devise* (*g*); but upon the same principle to which we had before occasion to advert, in the case of a springing or shifting use, it used to be a rule that no limitation, capable of being considered as a remainder, should ever be construed as an executory devise (*h*), although now, as we have seen (*i*), they will in certain cases be construed as executory limitations if they will be supported thereby. All executory devises are subject, like springing and shifting uses, to the Rule against Perpetuities (*k*); and therefore, until the Wills Act, 1837, it was held that if a

(*d*) 2 Bl. Com. 334; Co. Litt. by Butler, 272 a, n. (1).

(*e*) 1 Sand. *Uses*, p. 196.

(*f*) *Doe* v. *Field*, (1832) 2 B. & Ad. 564.

(*g*) Fearne by Butl. p. 386; 2 Bl. Com. 172.

(*h*) Fearne by Butl. pp. 386, 394, 525; *Doe* d. *Evers* v. *Challis*, (1851) 20 L. J. (Q. B.) 113.

(*i*) *Vide supra*, pp. 330, 331.

(*k*) 2 Bl. Com. 173, 334; Fearne by Butl. 430, 9th ed.; Co. Litt. by Butl. 271 b, n. (1), vii. 2.

chattel (real or personal) were bequeathed to A., and upon his *dying without issue*, then to B., the limitation over to B. was void, as being too remote (*l*); for such words imported (as we have just seen) an *indefinite* failure of issue. But in devises of the freehold, similarly worded, the objection of remoteness did not usually arise. For, in general, the law gave effect, in this case, to the limitation over, by considering the case of the first taker as amounting, by implication, to an estate *tail*; a construction which was not admissible in the former case, by reason of there being no estate tail in a chattel (*m*). And the ulterior estate was regarded as a *remainder*: which as it might always be barred by the recovery of the tenant in tail, did not fall within the rule against perpetuity. Now, however, since the enactment of sect. 29 of the Wills Act, 1837, it would seem that such a bequest would be good.

The conveyance by devise vested in the devisee *before and without entry* (subject, however, to his assenting to the devise) an actual freehold by construction of law (*n*), a devise being similar in this respect to a conveyance under the Statute of Uses, but different from a descent, which did not vest in the heir an estate complete for all purposes, unless and until he had made entry on the lands descended. How this rule is affected by the Lands Transfer Act, 1897, by s. 1 of which on the death of a testator his freehold lands are to vest in his personal representatives, is not very clear. Unlike an heir, a devisee was always entitled to disclaim the land devised to him (*o*).

(*l*) Fearne by Butl. p. 460.
(*m*) 2 Bl. Com. 398.
(*n*) Co. Litt. 111 a; *Garland* v. *Mead*, (1871) L. R. 6 Q. B. 441.
(*o*) *Doe* d. *Winder* v. *Lawes*, (1837) 7 A. & E. 212.

CHAPTER XXI.

OF EXTRAORDINARY CONVEYANCES—OR THOSE BY MATTER OF RECORD.

WE proceed to consider, THIRD, *Conveyances by matter of Record*, which, being in use on particular and comparatively rare occasions, may be designated "extraordinary conveyances." And they are — 1. Private Acts of Parliament; and 2. Royal Grants.

I. Private *Acts of Parliament* have been resorted to as a mode of assurance more frequently in modern than in antient times. [For it may sometimes happen that, by the ingenuity of some and the blunders of other practitioners, an estate is most grievously entangled by a multitude of resulting trusts, springing uses, executory devices, and the like artificial contrivances. Or it may be necessary, in settling an estate, to secure it against the claims of infants, or other persons under legal disabilities; who are not, in general, bound by any judgments or decrees of the courts of justice. In proper cases, private Acts of Parliament are of a very advantageous character; and at the present day, Acts of this character are carried through, in both houses, with great deliberation and caution, particularly in the House of Lords, where it has been a not infrequent practice to have them referred to two of the judges, to examine and report on the facts alleged, and to settle all technical forms (*p*). Nothing also is done without the consent, expressly given, of all parties in being and capable of consenting, that have the remotest interest in the matter, unless indeed such

(*p*) May, *Parliamentary Practice*, pp. 820, 833, 8th ed

[consent shall appear to be perversely, and without any reason, withheld; and an equivalent in money or other estate is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the Acts. A general saving is also constantly added at the close of the bill, of the rights and interests of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named; though it hath been holden that, even if such saving be omitted, the Act shall bind none but the parties (*q*).

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session, and it hath been relieved against, when obtained by fraudulent suggestions (*r*).] Formerly, too, it was subject in every case to this further distinction, that though all public statutes are noticed by the court *ex officio*, no private one was entitled to judicial notice unless specially set forth and pleaded. Such is still the rule as to those passed up to 4th February, 1851, inclusive; but by the Interpretation Act, 1889, s. 9, repealing but in substance re-enacting Lord Brougham's Act of 1850, s. 7, it is provided that every Act passed after the year 1850 shall be judicially taken notice of, unless the contrary be expressly provided and declared by the statute itself (*s*).

II. *Royal grants* are also matter of public record; [for, as St. Germain says, the King's Excellency is so high

(*q*) *Sir Francis Barrington's Case* (1610) 8 Rep. 138 a; Godb. 167; *Chapman* v. *Brown* (1765), 3 Burr. 1626.

(*r*) *M'Kenzie* v. *Stewart*, Dom. Proc. 13th March, 1754.

(*s*) As to all private Acts, it may be observed that up to 25 Hen. 8 they were enrolled on the rolls of parliament; but from that date until 32 Geo. 2, the *titles* only usually appear on the rolls. Under the existing practice, even the titles are not now enrolled, but the Acts themselves are preserved at the Private Bill Office.

[in the law, that no freehold may be given to, nor derived from him, but by matter of record (*t*). And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all his grants must pass, and be transcribed, and enrolled, in order that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, offices, or aught besides, are contained in charters or *letters-patent*, that is, open letters, *literæ patentes*, so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and they are usually directed or addressed by the King to all his subjects at large. And therein they differ from certain other letters of the King, which are also sealed with the great seal, but are directed to particular persons and for particular purposes; which, therefore, not being proper for public inspection, are closed up, and sealed on the outside, and are thereupon called *writs close*, *literæ clausæ*, and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*.

The course of proceeding formerly observed with respect to the making out of a grant by letters patent was in general as follows:—They were, first, to pass by *bill*, prepared by the attorney-general and solicitor-general, in pursuance of a warrant from the Crown, and thereafter signed (that is, superscribed at the top) with the sovereign's own *sign manual* and sealed with the *privy signet*, which was always in the custody of the principal secretary of state. And then sometimes the bill immediately passed under the great seal, in which case the patent was subscribed in these words, "*per ipsum regem*, by the King himself" (*u*). Otherwise, the course was to carry an extract of the bill to the keeper of the *privy seal*, who made out a writ or warrant thereupon to the Chancery,

(*t*) *Doct. and Stud.* b. 1, d. 8. (*u*) 2 Rep. 17 b.

[so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal. And in this last case, the patent was subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*x*).] But the practice as to grants by patent was latterly greatly simplified by the statute 14 & 15 Vict. c. 82 (*y*), which provided that in every case where any gift, grant, or writing whatsoever to be passed under the great seal would have before required a bill from the office of the signet or of the privy seal, Her Majesty might, by warrant under the royal sign manual, addressed to the lord chancellor, command him to cause letters-patent to be passed under the great seal according to such warrant; and that such warrant should be prepared by the attorney-general or solicitor-general, and should set forth the proposed letters-patent, and should be countersigned by one of the principal secretaries of state, and sealed with the privy seal (*z*). Such was the general course of proceeding as established by that statute: but inasmuch as some letters-patent, writs, commissions or other instruments, might, before the statute, have been passed under the great seal, by authority of the lord chancellor or otherwise, without passing through the offices of the signet and the privy seal, all these were excepted, by an express proviso, from its operation. There are also some royal grants or appointments which only pass through certain offices, as the Admiralty, the Home Office, or Treasury, under the authority of a *sign manual*, without the confirmation of either the *signet*, the *great* or the *privy* seal; and to these of course the statute had no application (*a*). And now, under the Patents, Designs, and Trade Marks Act, 1883 (*b*), patents for inventions are simply sealed with the seal of the patent office, and by the Great Seal Act, 1884 (*c*), it has been

(*x*) 2 Rep. 17 b; 2 Inst. 555.

(*y*) Now repealed by the Great Seal Act, 1884.

(*z*) By the Crown Office Act, 1877, s. 4, *wafer* seals might be used.

(*a*) Officers Commissions Act, 1862.

(*b*) 46 & 47 Vict, c. 57; 48 & 49 Vict. c. 63.

(*c*) 47 & 48 Vict. c. 30, repealing

provided generally, that a warrant under the sign manual, countersigned by the lord chancellor or a secretary of state, or the high lord treasurer, or two of the treasury commissioners, shall be a sufficient authority for passing any instrument under the great seal, and that for the future no instrument need be passed under the privy seal. But where any instrument might before the Act have been passed under the great seal by the fiat of the lord chancellor or otherwise, without passing through any other office, it is to continue to be so passed.

[The manner of a grant by the Crown (as above set forth), does not more differ from that by a subject, than the *construction* of such grants when made. For, 1. A grant made by the Crown, *at the suit of the grantee*, shall be taken most beneficially for the Crown, and against the party, whereas the grant of a subject is construed most strongly *against* the grantor. It is usual therefore to insert in all royal grants that they are made, not at the suit of the grantee, but "*ex speciali gratiâ, certâ scientiâ, et mero motu regis*"; and then they have a more liberal construction (*d*), as is also the case where they are made upon a valuable consideration. 2. A subject's grant is construed to include many things besides what are expressed, if necessary for the operation of the grant (*f*); but the grant by the Crown shall not enure to any other intent than that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the King is mistaken or deceived, either in matter of fact, or in matter of law, as in case of false suggestion, misinformation, or misrecital, of former grants; or if his title to the thing granted be different from what was supposed; or if the grant be informal; or if an estate be granted contrary to the rules of law,—in any of these

the 27 Hen. 8, c. 11; 14 & 15 Vict. c. 82; and the Great Seal Act, 1880 (43 & 44 Vict. c. 10), s. 3.

(*d*) Finch, L. 100; *Arthur Legat's Case* (1612) 10 Rep. 112.

(*f*) Co. Litt. 56 a; Litt. s. 206.

[cases the grant is absolutely void (*g*). For instance, if the King grant lands to one and his *heirs male*, this is merely void. For it shall not be an estate tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue; neither is it a fee simple, as in common grants it would be, because it may reasonably be supposed that the King meant to give no more than an estate tail (*h*). The grantee is therefore (if anything) nothing more than a tenant at will (*i*). And to prevent deceits being practised on the sovereign, with regard to the value of the estate granted, it was particularly provided by the 1 Hen. IV. c. 6, that no grant of the Crown should be good, unless express mention was made of the real value of the lands in the grantee's petition for them.] As to the mode of proceeding for calling in question the validity of the King's grant, it is in general by writ of *scire facias* at suit of the Crown, issued at the instance, or at least with the sanction, of the attorney- or solicitor-general (*k*). But as regards letters-patent for inventions, the proceeding by *scire facias* to repeal the patent has been abolished, and in lieu thereof a petition to the Crown is now provided, praying for the revocation (*l*).

Lastly, we may observe, with respect to the *subject-matter* of royal grants, that restrictions have been placed by legislative enactment on the alienation of the royal domain (*m*); the general effect of which (though subject to a variety of exceptions) is to make such alienations unlawful for any longer period than thirty-one years (*n*).

(*g*) Freem. 172; *Gledstanes* v. *Earl of Sandwich*, (1842) 4 Man. & G. 995.

(*h*) Finch, 101, 102.

(*i*) Bro. Abr. tit. Estates, 33; tit. Patents, 104; Dyer, 270; Dav. 45.

(*k*) 12 & 13 Vict. c. 102, s. 29, &c.

(*l*) Patents, Designs and Trade Marks Act, 1883, s. 26.

(*m*) 1 Anne, c. 1; 10 Anne, c. 28; 10 Geo. 4, c. 50; 1 & 2 Vict. c. 95, s. 4.

(*n*) See also 10 Geo. 4, c. 50, s. 125 (as to making a parliamentary return of all Crown grants), and 38 & 39 Vict. c. 87, ss. 65, 66 (as to the registration of all such grants); and see generally 15 & 16 Vict.

But the private property of the King—that is, any estate purchased out of the privy purse, or coming to His Majesty, his heirs or successors, by descent or otherwise, from persons not being kings or queens of the realm—may be disposed of by him as freely as any estate belonging to a private individual (*o*).

c. 62; 29 & 30 Vict. c. 62; and 57 & 58 Vict. c. 43, being respectively the Crown Lands Acts, 1852, 1866, and 1894.

(*o*) 39 & 40 Geo. 3, c. 88 (amended by 47 Geo. 3, sess. 2, c. 24); 4 Geo. 4, c. 18; 25 & 26 Vict. c. 37; 36 & 37 Vict. c 61.

CHAPTER XXII.

OF TITLE TO COPYHOLDS.

THE general law on the subject of copyholds has already been treated in this Book. In Chapter II., we have spoken of copyhold tenure, its origin and its peculiar incidents. In Chapter V., we have spoken of the interests or estates which may be held by copy of court roll, and their general characteristics, in so far as they have any. It now remains, therefore, only to speak of the *titles* by which copyhold interests may be acquired and lost, including that special process known as enfranchisement, now so much encouraged by our law, by which copyhold interests are converted into socage or freehold.

Any attempt to transfer a copyhold, either for an estate of inheritance or for life, by any freehold assurance (unless where such assurance is specifically appointed by some statute), is in general attended with no other effect but to occasion a forfeiture to the lord. [Yet by the lord's *licence*, the copyholder may by a common law deed demise for a term of years (*p*), and, even without his licence, for a single year. And custom and the indulgence of the law, which favours liberty, also allow him to exercise a substantial, though indirect, right of alienation to any extent whatever, whether in fee, for life, or for years, under colour of a *surrender* of his interest to the lord, and an *admittance* or grant by the latter, *de novo*, to the tenant's nominee, such admittance being attended with those ceremonies of investiture, which marked in former days the original donation of a fief.] And under the express provision of particular statutes, he may (even by

(*p*) *Melwich* v. *Luter*, (1588) 4 Rep. 26 a.

a common law deed) convey the whole fee simple estate (so called) in the copyhold tenement, *e.g.*, by deed poll under the Lands Clauses Act, 1845 (*q*), or by an ordinary deed under the Settled Land Act, 1882 (*r*). But, save as so enabled by statute, he cannot by any common law mode of assurance (other than by his will), convey the copyhold estate (*s*).

The nature of a surrender and admittance, independently of recent legislation, was, according to the custom of most manors, as follows. [The tenant came to the steward of the manor, either in court, or (if the custom permitted) out of court, and then, by delivering up a rod, a glove, or other symbol, as the custom directed, resigned into the hands of the lord, by the hands and acceptance of his steward, or to the other person or persons authorized by the custom to receive it, all his interest in and title to the estate, in order that the same might be again granted out by the lord, to such persons and for such uses as were named in the surrender, and as the custom of the manor would warrant. And upon such surrender, the lord, by his steward, granted the same land again to the surrenderor's nominee (the surrenderee), to hold by the antient rents and customary services; and thereupon admitted the surrenderee as tenant to the copyhold, according to the form and effect of the surrender, by delivering up to him the rod, or glove, or other article, as the symbol of corporeal seisin of the lands and tenements. Upon this admission the surrenderee paid a fine to the lord, according to the custom of the manor.]

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts, the surrender and the admittance.

(*q*) 8 & 9 Vict. c. 18, s. 95.

(*r*) 45 & 46 Vict. c. 38, s. 20. (In both these cases the deed must, however, be entered on the rolls of the manor.)

(*s*) *Dimes* v. *Grand Junction Canal*, (1846) 9 Q. B. 469; 3 H. L. C. 794.

1. [A *surrender* is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, until admittance of the surrenderee, the lord taketh notice of the surrenderor, as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. And the lord cannot take notice of the surrenderee for any purpose (*t*). Yet the interest remains in the surrenderor, not absolutely, but *sub modo*; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender.] And he is considered as a trustee for the surrenderee, who has an equitable interest capable of being devised or otherwise assigned (*u*); and the surrenderee has a right to call upon the lord to admit him, and in the event of his refusal may compel him to do so, by mandamus or other appropriate proceeding in the High Court of Justice (*x*). But no estate whatever is vested in the surrenderee as *copyhold tenant*, before admittance; [and if he enters without, he is, strictly speaking, a trespasser. And if, on such entry, he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed, as if by relation (*y*). For, though he be afterwards admitted in pursuance of the original surrender, and thereby acquire a sufficient and plenary interest as absolute owner, yet his surrender to another previous to his own admittance is absolutely void *ab initio*, because, at the time of such surrender, he had but a possibility of an interest, and could therefore transfer nothing by the purported surrender. And no subsequent admittance can make an act good which was *ab initio* void.] But an unadmitted devisee may now (under the Wills Act, 1837,

(*t*) *Doe* v. *Tofield*, (1809) 11 East, 246.

(*u*) *Dimes* v. *Grand Junction Canal*, *ubi sup.*

(*x*) *R.* v. *Brewer's Co.*, (1824) 3 B. & C. 172.

(*y*) *Doe* v. *Tofield*, *ubi sup.*, at p. 251.

ss. 3, 4) make an effectual devise, his devisee paying a double fine, together with double fees and double stamps.

Surrenders were formerly said to be made upon a tacit condition that they should be *presented* by the homage, or general body of the freehold tenants of the manor, for the instruction of the lord and the other tenants (*z*). But presentment is now unnecessary, the Copyhold Act, 1894, providing (*a*) that a valid admittance of copyholds may be made without presentment by the homage of the surrender or other instrument or fact on which it is based.

2. [*Admittance* is the last stage or perfection of the copyhold assurance; and it may be either an admittance upon a surrender or devise by the former tenant, or an admittance upon a descent from the ancestor, or upon a voluntary grant from the lord. In the first two cases, the lord is a mere instrument, that is to say, no manner of interest passes into him by the surrender or devise, or by the death of the tenant, and no interest passes out of him by the act of admittance; but the claim of the tenant who is admitted is solely under him that made the surrender, or under the ancestor (*b*). And, therefore, neither in the one case nor in the other, is any respect had to the quality or quantity of the lord's estate in the manor. For, whether he be tenant in fee or for years, or whether he be in possession by right or by wrong, is not material; and the admittances made by him shall not be impeached on account of his title, because they are ministerial acts, which every lord in possession is bound to perform (*c*).

Admittances, upon surrender differ, however, from admittances upon descent, in this, that, by surrender, nothing is vested in the surrenderee until admittance; but, upon descent, the heir is tenant by copy immediately

(*z*) Elton, *Copyholds* (2nd ed.), p. 65.

(*a*) Sect. 84.

(*b*) Co Litt. 59 b.

(*c*) Co. *Copyholder*, 41.

[upon the death of his ancestor. Not indeed to all intents and purposes, for he cannot be sworn on the *homage*, nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as a perfect tenant of the land, instantly upon the death of his ancestor. For example, he may, before admittance, enter into the lands, take the profits, and punish trespassers; nay, upon satisfying the lord for his *fine* due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine; and not so much necessary for the strengthening and completing of the heir's title. Hence, indeed, an observation might arise, that, if the benefit which the heir is to receive by the admittance is not equal to the charge of the fine, he will never come in and be admitted to his copyhold in court: and so the lord may be deprived of his fine. But to this we may reply, in the words of Sir E. Coke (*d*)—"I assure myself, if it were in the election "of the heir to be admitted, or not to be admitted, he "would be best contented without admittance; but the "custom in every manor is compulsory in this point. For "either upon pain of forfeiture of copyhold, or of incurring "some great penalty, the heirs of copyholders are "enforced in every manor to come into court, and be "admitted according to the custom, within a short time "after notice given of their ancestor's decease."] Accordingly, by the custom of most manors, if no person come in to be admitted in the place of a deceased tenant, the lord, after making due proclamatiou at three consecutive customary courts, may seize the land into his own hands, *quousque*, that is, *until* some person claims to be admitted (*e*). And by reason of the difficulty sometimes experienced by lords in procuring tenants to

(*d*) *Ibid.*

(*e*) *Doe* v. *Muscott*, (1844) 12 M. & W. at p. 840.

be admitted, *e.g.*, when they are infants or married women, it has been provided by the Infants' Property Act, 1830, that the lord may (on their failure to come in and be admitted) himself appoint an attorney for them to take admittance, and may admit them by such attorney accordingly, and proceed thereupon to recover his fine. And the like provisions are applicable also to the case of lunatic copyholders (*f*).

But though, in the case of an admittance upon surrender, no copyhold estate is vested in the surrenderee until he is admitted, and it is distinguishable in this respect from an admittance upon descent; yet it is material to observe, that even an admittance upon surrender, when made, has a retrospective relation, in point of time, to the surrender itself. And therefore, if the surrenderor dies after the surrender, and before admittance, though his heir will take by descent in the interim, yet, on the admittance of the surrenderee, the heir's estate will be defeated (*g*). In conclusion, we should observe that it is only the legal estate that is considered upon a surrender and admittance (*h*); and that the steward may, in the absence of special custom, reject any surrender which purports to disclose a trust (*i*).

[Such is, in general, the nature of a surrender and admittance, in the simplest form; and the only variation upon the proceeding, which it is material at present to notice, relates to a conveyance by way of mortgage. Here the surrender is made upon *condition* that the money remains unpaid at the time appointed; but in the meantime no admittance takes place, at least in general. If the money be paid at the time appointed, the surrender, not having been perfected by admittance, is void without further ceremony; nor is it the usual course to complete

(*f*) Lunacy Act, 1890, ss. 125, 126.

(*g*) *Doe* v. *Hall*, (1812) 16 East, 208.

(*h*) *Hall* v. *Bromley*, (1887) 35 Ch. D. 642.

(*i*) *Flack* v. *Downing College*, (1853) 13 C. B. 945.

[the copyhold estate by admittance, even supposing the money to remain unpaid, unless the mortgagee wishes to take possession. The conditional surrender constitutes the security, and continues to do so until the mortgage is satisfied. An entry of such satisfaction is then made on the court rolls, after which the original title of the mortgagor is considered as remaining in full force. The conditional surrender is usually preceded by a deed, containing the covenant to surrender, and the other clauses and stipulations usual in a mortgage.

The admittances of which we have hitherto spoken are those used to complete an inchoate title by surrender or descent. It is to be observed, however, that there is another kind of admittance, viz., that which is connected with an original voluntary grant from the lord himself, and not with any preceding surrender or devise or descent. And this occurs chiefly in the case where the lord has himself acquired the copyhold interest, in consequence of some escheat, forfeiture, descent, surrender to his own use, or other circumstance, so that the freehold and copyhold interest are united in his person. In such latter case, the lord may, if he thinks proper, grant the lands out *de novo* to hold by copy; but if he does this, he is bound to observe the antient custom precisely in every point, and can neither in tenure nor in estate introduce any kind of alteration. For that were to create a new copyhold, which, as this tenure depends on immemorial custom, cannot be done. Thus, if a copyhold for life falls into the lord's hands and he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects (*k*); nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord (*l*).

Formerly the lord might, where there was a special custom in the manor to that effect, make grants of

(*k*) Co. *Cop.* 41.

(*l*) *Swayne's Case*, (1608) 8 Rep. 63 b.

[portions of the *waste*, to be held for the first time by copy of court roll; usually, however, only with the assent of the homage.] But it is now provided, by the Copyhold Act, 1894, that no such grants shall be made in any case, without the previous consent of the Board of Agriculture, and that all such grants shall, *ipso jure*, operate as enfranchisements.

Again, admittance may also take place in the case of a devise; for a copyhold estate is now as devisable by will as a freehold. Formerly, copyholds were not directly devisable, even after lands of freehold tenure had become so; but when a man wished to devise his copyhold, he made a surrender of it *to the use of his will*, and afterwards in his will designated the person to be admitted as devisee (*m*). However, by a statute of the year 1815 (commonly called Preston's Act), every disposition made by will, by a person dying after the passing of that Act, was made as effectual *without* a surrender to the use of his will, as it would have been if such a surrender had taken place. And now, by the Wills Act, 1837, it is provided that all the *real estate* of the testator may be devised; and under that description, all his copyholds, though he should not have surrendered them to the use of his will, nor have even been admitted to them himself, are expressly included (*n*). The devisee is accordingly admitted on production of the will.

In manors where a custom to entail existed, an estate tail might have been barred by a customary recovery, founded on a fictitious action in the lord's court, according to the analogy of a common recovery in the Court of Common Pleas; or such customary estate tail might (according as the custom was) have been barred by a surrender. But now, by the Fines and Recoveries Act, 1833, a disposition by tenant in tail of the legal estate in a copyhold must in every case be by surrender (*o*),

(*m*) Co. *Cop.* s. 36.
(*n*) Sect. 3; *Garland* v. *Mead*, L. R. (1871) 6 Q. B. 441.
(*o*) Sect. 50.

subject to provisions as to the consent of the protector of the settlement (where there is one), analogous to those which the statute introduced in relation to the disentailing of freehold lands (*p*). And the surrender requires no enrolment, otherwise than by entry on the court rolls (*q*). The Act also contains provisions with respect to the copyholds of a *married woman* (tenant in tail or otherwise) (*r*); but, regard being had to the operation of the Married Women's Property Acts, hereafter to be dealt with, these provisions have now little importance.

The preceding remarks relate, it will be observed, to the manner of conveying the *legal* estate in copyhold lands. With regard to *equitable* interests in lands of this tenure, they do not in general pass by surrender, (none but the owner of the legal estate being tenant to the lord, nor consequently entitled to surrender), but by any ordinary mode of conveyance sufficient to pass an equitable interest in freeholds. As regards equitable *estates tail*, however, it is provided by the Fines and Recoveries Act, 1833, that they shall pass either by surrender, or by disentailing or other deed, attended with the same formalities in general which are prescribed by that Act with reference to transactions affecting legal estates (*s*).

It now remains to notice, briefly, the results of a long series of Copyhold Acts passed in the course of the nineteenth century, having for their main objects the facilitating of the process of commutation of the casual incidents of copyhold tenure into fixed annual payments, and the gradual extinction of the tenure itself by the process of enfranchisement (*t*).

In promotion of these views, the earlier Acts established a Board of "Copyhold Commissioners," now merged in

(*p*) Sects. 51, 52.
(*q*) Sect. 54.
(*r*) Sects. 77, 91.
(*s*) Sects. 50, 53, 90.
(*t*) The unrepealed provisions of these statutes were consolidated and re-enacted by the Copyhold Act, 1894.

the Board of Agriculture, and they enacted: First, with regard to *commutations*, that by way of a general scheme for the whole manor, the future rents, fines, and heriots, and the lord's rights in timber, and also (if so expressed) in mines and minerals, might in all cases be *commuted* by agreement, the parties to such agreement being respectively interested to the extent of three-fourths at least in value, and the number of the tenants parties to the agreement being, at least, three-fourths of the whole. And although such *general* commutations ceased to be made (*u*), still *particular* commutations between the lord of the manor and any one or more of his tenants continue to occur, and (after confirmation by the Board of Agriculture) are binding on the parties and on all other persons connected with them in title. After a commutation duly effected, the lands, although still remaining copyhold for most purposes, cease to be subject to any customary mode of descent or to any custom relating to dower, freebench, or tenancy by the curtesy, except as to persons married before the commutation took place (*x*).

Secondly, certain improvements in copyhold tenure were introduced by the earlier Copyhold Acts, chiefly by the Copyhold Act, 1841; and these improvements have been continued by the Copyhold Act, 1894. Thus, to remove doubts before existing on the subject, it is provided, that it shall be lawful for the courts to make partition of copyhold lands, as well as of lands of freehold tenure, and to do so by the like order as in the case of freehold lands (*y*). And to obviate certain inconveniences previously attaching to the practice upon surrenders, admittances, and grants, it is enacted, that lords of manors (or their stewards or deputy stewards), may hold

(*u*) The provisions authorizing them were repealed by the Copyhold Act, 1858.

(*x*) Copyhold Act, 1894, s. 79. (The custom of gavelkind is expressly reserved.)

(*y*) *Ibid.*, s. 87.

customary courts, though there should be no copyhold tenant at the time, or none should be present; and may grant lands to be held by copy, and also admit to lands to be held by copy, at any time or place, and without holding a court (*z*). When, however, by the custom of any manor, the lord is authorised, with the consent of the homage, to grant parcels of the waste to be held by copy, the consent of the homage assembled at a customary court, duly summoned and held according to the custom, is still necessary (*a*). And inasmuch as, by the custom of some manors, a licence from the lord to aliene was required, and in some of these cases lords were restrained, by the custom, from granting licences to their tenants to divide their antient tenements, the new Acts provide that licences to aliene parcels may now be granted, and such alienation may be made accordingly (*c*).

Finally, with a view to facilitating *enfranchisement*, that is to say, the conversion of the copyhold into freehold, the Copyhold Act, 1894, re-enacting the like provisions contained in the earlier Copyhold Acts, provides, in substance, (for no minute detail can be attempted in this place), that, with the consent of the Board of Agriculture, the lord and the tenant, whatever their interests, may, either by mutual agreement or at the instance of either, effect an enfranchisement of a copyhold tenement. In the case of a voluntary enfranchisement, the compensation to be paid to the lord for the loss of his manorial rights is agreed upon by the parties, and may take various forms (*d*). Where the enfranchisement is compulsory, the parties may yet agree upon the proper compensation, or, if they cannot, it may be fixed by valuers appointed by them, or by the Board of Agriculture. If, however, the compulsory enfranchisement is at the instance of the lord, or the compensation amounts to more than one year's value of

(*z*) *Ibid.*, ss. 82, 84.
(*a*) *Ibid.*, s. 83.
(*c*) *Ibid.*, s. 86.
(*d*) *Ibid.*, ss. 15—17.

the lands, it takes the form of a rent-charge (unless the parties agree otherwise); in other cases it is a lump sum paid before actual enfranchisement (*e*).

Upon every enfranchisement, whether compulsory or voluntary, the land becomes in all respects of freehold tenure, and ceases to be subject to any particular custom whatever (*f*); but, on the other hand, no compulsory enfranchisement compulsorily affects any right as to mines or minerals, or any right of fair or market, or of game, fish, or fowl (*g*), or the lord's right of escheat (*h*). And these provisions of the Copyhold Act, 1894, extend also to extinguishing, in the case of freehold lands held of the manor, the heriots or other like incidents of tenure annexed thereto (*i*).

The actual enfranchisement is effected, in voluntary cases, by a deed conferring upon the owners of the copyhold tenement the freehold reversion or seignory of the lord; but, in the case of voluntary enfranchisement by limited owners, the consent of the Board of Agriculture is required (*k*). In compulsory enfranchisements, the conversion of the copyhold tenement into a freehold is effected by the award of the Board (*l*). In either case, the compensation secured to the lord, and the freehold interest in the enfranchised tenement, enure for the benefit of all the persons previously interested in the manor and the copyhold tenement respectively, in proportion to their respective interests (*m*).

(*e*) *Ibid.*, ss. 5—8.
(*f*) *Ibid.*, s. 21.
(*g*) *Ibid.*, s. 23.
(*h*) *Ibid.*, s. 21 (6).
(*i*) *Ibid.*, ss. 2, 94.
(*k*) *Ibid.*, s. 16.
(*l*) *Ibid.*, s. 10.
(*m*) *Ibid.*, s. 21.

CHAPTER XXIII.

OF INCORPOREAL HEREDITAMENTS, CALLED ALSO "PURELY INCORPOREAL" HEREDITAMENTS.

INCORPOREAL hereditaments now remain to be considered. As we have said, in a previous chapter, incorporeal hereditaments are "not the subject of sensation, can neither be "seen nor handled, are creatures of the mind, and exist "only in contemplation." The meaning of which elaborate definition, borrowed from the older law books, is simply this, that incorporeal hereditaments do not confer upon their owners *seisin*, or even *possession*, of the land with which they are connected. Some indeed, as personal annuities descendible to heirs, though they are hereditaments in the strict sense, are not connected with land at all, and are, therefore, not real estate, but personalty. By far the greater number, however, of incorporeal hereditaments recognised by our law are issuing out of, exercised over, or in some way connected with *land;* and fall, therefore, properly to be discussed under the head of *Things Real.*

But it may be objected, that certain of the interests which we have already discussed, *e.g.*, estates in reversion and remainder, do not confer seisin or possession upon their owners. That is, undoubtedly, true; and therefore these interests are, by some writers, very plausibly treated as incorporeal hereditaments (*n*). But they differ from the class of interests to be discussed in this chapter, in the important fact, that they will, in due

(*n*) This classification was more justifiable at the time when corporeal hereditaments "lay in livery" only, and not "in grant." (See Real Property Act, 1845, s. 2.)

course, at some future time confer seisin or possession, by the expiry of the particular estates which precede them. They thus share largely the character of *corporeal hereditaments*, amongst which we have classed them; while the more defined and limited interests which we now propose to discuss, and which never (except by way of remedy to recover them (*o*)) confer possession of the land upon their owners, may fairly be described as hereditaments *purely incorporeal*.

Incorporeal hereditaments, in this latter sense, include (amongst other species not requiring notice) *advowsons*, *tithes*, *commons*, *ways*, *watercourses*, *lights*, *offices*, *dignities*, *franchises*, *corodies*, *pensions*, *annuities*, and *rents*. But, for the discussion of many of these subjects, places more distinctly appropriate will be found hereafter; and therefore, in the present chapter, we shall direct the reader's attention only to the following heads, namely, *commons*, *ways*, *watercourses*, *lights*, *franchises*, and *rents* (including *annuities*). These interests, or, as they are frequently called, *jura in alieno solo*, fall into two classes, according as they do, or do not, confer upon the persons entitled to exercise them the right to take actual tangible subject-matter. Thus, commons, rents, and some franchises, are called *profits*, or *profits à prendre*; because they involve the taking of grass, wood, money, and the like. But ways and lights, which confer only rights of user, not of taking away, are called *easements* (*p*). There is, as we shall hereafter see, considerable legal importance attached to this distinction.

I. [*Common* (or right of common) is a profit which a man hath in the land of another, as to feed beasts, to catch fish, to dig turf, to cut wood, or the like. The

(*o*) *e.g.*, rent-charges under s. 44 of the Conveyancing Act, 1881.

(*p*) Curiously enough, a right to take water from a *natural* channel or pond is an easement, not a profit. (*Race* v. *Ward*, (1855) 4 E. & B. 702.)

[right derives its name from the community of interest which thence arises between the claimant and the owner of the soil, or between the claimant and other commoners entitled to the same right; all which parties are entitled to bring actions for injuries done to their respective interests—and that both as against strangers and as against each other (*q*). There are several sorts of common, *e.g.*, common of pasture, common of piscary, common of turbary, and common of estovers.

1. Common of pasture is the principal and most frequent sort, being the right which a man has to feed his beasts on another's land; and, in respect of title, it is either *appendant, appurtenant, because of vicinage*, or *in gross* (*r*).

Common of pasture *appendant* is a right, belonging to the tenants of arable land within manors, to put commonable beasts upon the lord's wastes. Commonable beasts are such beasts as are necessary, either for the ploughing of the land or for its manuring, viz., horses and oxen, cows and sheep. This species of common of pasture is a matter of universal right; and it was originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of lands to tenants, these tenants could not plough or manure the lands without beasts, these beasts could not be sustained without pasture, and pasture could not be had but upon the lord's wastes, and on the uninclosed fallow lands of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of lands.] From this of course it follows, that it is only in respect of *arable* land that common appendant can be claimed; though it may be claimed by that name as appendant to a farm now in fact containing pasture, for the land shall be presumed (where there is usage to sustain the claim)

(*q*) *Robert Marys' Case*, (1612) 9 Rep. 113.

(*r*) Co. Litt. 122 a.

to have been originally arable. It follows, also, that common appendant is incapable of being created at the present day (*s*); for all manorial tenure must have had existence before the passing of the statute of *Quia Emptores*, in the eighteenth year of Edward the First (*t*).

[Common *appurtenant*, frequently confounded with common *appendant*, ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships, and may extend to other beasts besides such as are generally commonable, as to hogs, goats, geese, or the like. This, not arising from any natural propriety or necessity, like common appendant, is not therefore of general right, but can only be claimed by grant, or by the long usage of particular persons to enjoy the same (*u*); which latter title is commonly called a title by *prescription*, and is supposed to be founded on a special grant or agreement originally made for this purpose.

Common *because of vicinage* (or neighbourhood) is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying naturally into the adjoining wastes of the other, without any molestation from either. This, indeed, is only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally

(*s*) Year Book, 26 Hen. 8, Trin. (1534), fo. 4, pl. 15.

(*t*) [I know of no authority for this remarkable statement. Mr. Scrutton (*Commons and Common Fields*, p. 55) says that "in 1285 (? 1290) the Statute *Quia Emptores* created a change: no new freehold tenants could be so enfeoffed as to hold their lands as tenants of the manor." So far as I know, the Statute only applied to "lands sold to be held *in fee simple*" (c. 3 (2)). The first part of the sentence in the text undoubtedly represents a long-established tradition.—E. J.]

(*u*) *Tyrringham's Case*, (1585, 4 Rep. 36 b.

[into the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass (*x*). In close connection with this, and substantially of the same kind, is the right described in the books as *common of shack*, or the right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field (*y*). Indeed, this kind of common, which in the beginning was but in the nature of a pasture *because of vicinage*, and founded on the same reason, has now long since in many parts of the country insensibly changed its nature, and has become, by the force of custom, a right so fixed, that even though the owner of any particular parcel should assume, merely on his own authority, to inclose his land in severalty, it would still continue subject to the antient rights of the intercommoners (*z*). And originally these lands, lying together in a common stock, were most probably in the nature of *common fields*; being lands which time out of mind have been divided between certain persons, a certain quantity or acreage to each in severalty, but the acreage being lotted to them yearly, sometimes in one part of the common field and sometimes in another part of it. So that the allottees have, in fact, a movable fee simple in the certain acreage of each (*a*).

Common *in gross* (or at large) is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescription (*b*). This is a separate inheritance, entirely distinct from any other land that may be vested in the person to whom the right of common belongs, and, apparently, although he should not have any other land at all.

Common of pasture, by whatever title held, may, in

(*x*) Co. Litt. 122 a; *Commissioners of Sewers* v. *Glasse*, (1874) L. R. 19 Eq. 160.

(*y*) *Corbet's Case*, (1585) 7 Rep. 5; *Cheesman* v. *Hardham*, (1818) 1 B. & Ald. 706.

(*z*) *Corbet's Case*, *ubi sup.*

(*a*) Co. Litt. 4 a.

(*b*) *Welcome* v. *Upton*, (1840) 6 M. & W. 536.

[respect of time, be either limited or unlimited; that is, may either be confined to particular seasons of the year, or may last all the year round. But as regards the number of beasts to be turned on, the right is in general subject to restriction; for all commons (except those in gross) must be either claimed in respect of some number in particular, or at least in such manner as tends to limit the number, as for all cattle *levant* and *couchant* on the land to which the common is appendant or appurtenant; that is, for so many as the land is capable of maintaining during the winter. And a claim subject to no limitation of either kind, except perhaps in the case where an express grant to that effect could be shown, would be void (*c*). But with respect to common in gross, it may be either limited to a particular number or, *semble*, it may be absolutely unlimited; in which case it is sometimes called a common *without stint*, or *sans nombre* (*d*).

2, 3. Common of *piscary* is a liberty of fishing in another man's water, as common of *turbary* is a liberty of digging turf upon another man's ground (*e*). These may be claimed either by grant or by prescription; and may be either appurtenant or in gross. Common of *turbary* cannot be claimed as appurtenant to land, but only to a house (*f*); and it authorises not the taking of turf except for the purpose of using the same as fuel, in the particular house to which the right is annexed (*g*).

4. Common of *estovers* or *estouviers* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use of furniture of a house or farm, from off another man's land. Like common of pasture, it may be claimed either by grant or prescription; and either as appurtenant or in gross. And note, that this common of estovers is exercisable *in alieno solo*, differing in this respect from the

(*c*) *Bennett* v. *Reeve*, (1740) Willes, 231.

(*d*) Co. Litt. 122 a.

(*e*) Co. Litt. *ubi sup.*

(*f*) *Tyrringham's Case*, (1585) 4 Rep. 37 a.

(*g*) *Valentine* v. *Penny*, Noy, 145.

[house-bote, &c., of a tenant for life, which are also called estovers, but which are taken *in suo solo, i.e.*, in the land itself of the tenant for life.

Much of the same kind as common of estovers is the so-called common *in the soil;* which consists of the right of digging for coals, minerals, stones, and the like (*h*). This last species, and common of turbary, bear a resemblance to common of *pasture* in many respects, though in one point they go much further. For common of pasture is only a right of feeding on the herbage and vesture of the soil, which renews annually; while common of turbary, and of digging for coals and the like, is a right of carrying away the very soil itself.

By the Statute of Merton (1235), the lord of the manor was authorised to inclose, as against his tenants claiming common *of pasture*, so much of the waste as he pleased, provided he left common sufficient for such as were entitled thereto (*i*); and this privilege was extended, by the Statute of Westminster the Second, to inclosures against claims to common appurtenant of persons not being tenants of the manor (*k*). This inclosure, when justifiable, is called in law "approving," an antient expression, signifying the same as "improving" (*l*); and the right is considered to belong equally to any owner of the waste, though he may not fall within the description of lord of the manor (*m*).

But the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, were deemed to be objects of so much importance to agricultural improvement, that they were not left in modern times to depend on this antient statute; but were introduced very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local Acts of Parliament, passed from time to time for

(*h*) Co. Litt. 122 a.

(*i*) 20 Hen. 3, c. 4.

(*k*) 13 Edw. 1, (1285) c. 46.

(*l*) 2 Inst. 474. (This is extremely doubtful. The words of the statute are *appruare se*, to "approve themselves.")

(*m*) *Glover* v. *Lane*, (1789) 3 T. R. 445.

[the purpose.] To avoid the expense and delay attendant on this practice was passed the Inclosure (Consolidation) Act of 1801, the aim of which was to consolidate a number of the regulations usually inserted in local Inclosure Acts, and to make them applicable (subject only to any special provisions) to every case of local inclosure. So popular did this policy of inclosure become, in the early years of the nineteenth century, when the rapid increase of population enabled manorial lords to realise huge fortunes by enclosing wastes for building purposes, that at last it was determined to do away altogether with the necessity of obtaining special powers from the legislature in each case, and to provide a scheme which should be easily applicable to all inclosure projects. This object was achieved by the passing of the Inclosure Act, 1845, the general effect of which is as follows. The Act establishes a Board of Commissioners under the denomination of "The Inclosure Commissioners for England and Wales," who now constitute the Inclosure Department of the Board of Agriculture (*n*). These commissioners are empowered, on the application of persons interested to the amount of one-third of the value of the lands subject to be inclosed, and provided the consent of persons interested to the amount of two-thirds of the value of the land, and of the lord of the manor (in case the lands be waste of a manor), be ultimately obtained, to inquire into the case, and to report for the information of Parliament with regard to the expediency of making such inclosure. The reports thus sent in by the commissioners are to be dealt with by an annual statute, which is to authorise the carrying out of such of the schemes reported by the commissioners as Parliament shall approve; and thereupon such schemes are to be proceeded with, the necessary details being effected by an award of the

(*n*) They were incorporated with the "Land Commissioners" by the Settled Land Act, 1882, s. 48, and the powers of this new body were, by the Board of Agriculture Act, 1889, transferred to that Board.

commissioners, made in pursuance of the Acts, after due enquiries and evidence. And the Act of 1845 declares, that immediately after such allotment and inclosure of the lands shall have been made, or from such other time as shall be fixed after proper notice, the common or other rights, which it is the object of the inclosure to commute, shall be *extinguished* accordingly; and it directs that copies of the award shall be deposited with the clerk of the peace for the county, and also with the churchwardens of the parish, so that recourse thereto may be freely had by any person interested in the premises.

So long as the policy which produced the Inclosure Act of 1845, and its numerous amendments, continued to receive popular approval, the process of inclosure went on rapidly under its provisions. Year after year, sometimes twice in a single session, Parliament passed a short Act authorising the carrying out of inclosure schemes recommended by the Inclosure Commissioners, until the disappearance of open spaces, especially in the neighbourhood of large towns, began to inspire thoughtful people with a doubt whether the vaunted policy of the Inclosure Acts was really for the benefit of the nation. It was generally believed that, apart from questions of public health, the rights of the poorer commoners had been somewhat neglected in the awards of the commissioners. Popular feeling began to manifest itself. The formation, in the year 1865, of the Commons Preservation Society, marks the turn of the tide. Statutes, passed with the object of hindering the rapid extension of that process which Parliament had hitherto been so anxious to promote, began to make their appearance. One of the earliest was the Metropolitan Commons Act of 1866, which expressly forbade the commissioners to entertain any proposal for the inclosure of a common within the Metropolitan Police District, and provided an elaborate machinery for the conversion of such commons into public parks and gardens. And this policy became general ten years later, when the

Commons Act, 1876, enacted that any common lands, in lieu of being inclosed, might be appropriated as open land, and *regulated* for the public use; and expressly provided, that any encroachment on, or inclosure of, a village green or recreation ground, having a known and defined boundary, should be a public nuisance, and summarily punishable before the magistrates. A civil jurisdiction is also thereby given to the county court of the district in the matter of any such nuisance, and that court may accordingly, as the justice of the case requires, grant injunctions or make orders of removal or abatement. So that the elaborate provisions of the Inclosure Act, 1845, though nominally unrepealed, have become almost a dead letter.

II. [The second species of incorporeal hereditaments which we propose to consider are *ways*, or the right of going over another man's ground. And by ways we do not here mean *highways*, which are common to the public, but *private* ways, in which one man has an interest and a right, whilst another is owner, or at least occupant, of the soil of the ways. Such ways may be grounded on special permission, as when the owner of land grants, by deed, to another man the liberty of passing over his (the grantor's) land, to go to church, to market, or the like; or they may be by prescription, *i.e.*, by implied grant, as if all the owners and occupiers of such a farm have long used to cross such a ground for such a particular purpose.] But it has recently been stated, by great authority, that there can be no such thing as a true right of way, or any other *easement*, held *in gross*, *i.e.*, independently of the claimant's interest in some dominant tenement, for the benefit of which the easement is claimed (*o*). At first sight this rule appears to be inconsistent with the well-known cases in which *jura in alieno solo* have been recognised as exercisable by the inhabitants of a particular

(*o*) *Rangeley* v. *Midland Rail. Co.*, (1868) L. R. 3 Ch. App. 311.

district, or other indefinite body (*p*). It is, however, probable, that this latter class of rights are not true incorporeal hereditaments at all, but merely personal privileges, incapable of being transferred. [A right of way may also arise of necessity ; as if A. grants to B. a piece of ground in the middle of his field, he at the same time tacitly and implicitly gives him a way to come to it (*q*), for that is *necessary* to its enjoyment. In like manner, a tenant at will has, after the determination of his interest by the lessor, free entry, egress, and regress into the land, in order to cut and carry away his emblements. For when the law gives a right, it gives everything necessary to the exercise of the right (*r*).]

III. *Watercourses* are the third species of incorporeal hereditaments, a watercourse being the right which a man has to the benefit of the flow of certain water. It is distinguishable from the right of merely using the water flowing over one's own soil, which is incident as of course to the property in the soil itself ; for the right to a watercourse involves the right to have the course of the water kept free from any interruption or disturbance to the prejudice of the claimant of the right, whether by diversion of the water, or any obstruction of its flow, or its pollution by any offensive commixture. This right belongs *primâ facie* to every occupier of land over which a stream passes (*s*) ; for though running water, air, and light are all *publici juris*, yet to a certain extent they are subject to appropriation by force of an actual occupancy. And he who is in possession of any soil, is *primâ facie* in possession also of the free course of the streams which flow over its surface (*t*) ; but streams underground

(*p*) *Fitch* v. *Rawling*, (1795) 2 H. Bl. 393 ; *Hall* v. *Nottingham*, (1875) L. R. 1 Ex. D. 1.

(*q*) *Clarke* v. *Cogge*, (1606) Cro. Jac. 170 ; *Hinchliffe* v. *Lord Kinnoul*, (1838) 5 Bing. N. C. 24, 25.

(*r*) Co. Litt. 55 a, 56 a.

(*s*) *Sury* v. *Pigot*, (1626) Poph. 166 ; *Miner* v. *Gilmour*, (1855) 12 Moo. P. C. 156.

(*t*) *Sampson* v. *Hoddinott*, (1857) 1 C. B. (N.S.) 590.

(including wells and springs) are ordinarily of too uncertain a character to admit of this appropriation (*u*). Moreover, the natural right, where it exists, may be divested by express agreement between the parties interested, or by long usage, which is evidence of some antient agreement of that description. And therefore my general claim to have the water of such a stream flowing freely and without disturbance over my land, may be successfully opposed by my neighbour, if he can prove that (by some grant of mine or of my ancestors) he is authorised to keep up a mill or the like, and thereby to cause an obstruction in the flow of the stream, or if he can establish a title by long usage to do so. For he has then by grant or by prescription a watercourse for such special purpose, to which the general right I might otherwise have had by occupancy has become subordinate.

IV. *Lights*, otherwise called *antient lights*, are a fourth species of incorporeal hereditaments, the term being used to express a man's right to have the access of the sun's rays to his windows, free from any obstruction by the occupier of adjoining land. For the element of light, like that of water, is capable to a certain extent of appropriation by mere occupancy, a man on his own land having (in the absence of rival claims) a right to a reasonable amount of the light which would naturally come to him. He may even erect a house on the boundary line of his property, and so as to overlook his neighbour, with as many windows as he pleases ; and by force of some grant, or by prescription, he may be or become entitled to maintain these windows in freedom from all obstruction. But in the absence of any grant, and before any prescriptive right has arisen, it is competent

(*u*) *Chasemore* v. *Richards*, (1857) 2 H. & N. 168 ; *Ballard* v. *Tomlinson*, (1885) 29 Ch. D. 120

to the owner of the adjoining land, by a wall or otherwise, to intercept or to obstruct the light, and so to prevent the easement from arising (*x*).

V. [*Franchises*, otherwise called *liberties*, are a fifth species of incorporeal hereditaments, a franchise being a royal privilege, or branch of the Crown's prerogative, subsisting in the hands of a subject (*y*). Franchises, therefore, being derived from the Crown, must either arise from royal grant, or be held by prescription, which pre-supposes such a grant (*z*). And they may be vested either in natural persons or in bodies politic; in one man or in many. But the same identical franchise that has before been granted to one cannot be bestowed on another; for that would prejudice the former grant.

To be a county palatine is a franchise vested in a number of persons; and to have a bailiwick or liberty exempt from the sheriff of the county, and wherein the grantee only and his officers are to execute process, is a franchise. There are also many franchises exercisable by lords of manors, as annexed to their manors, *e.g.*, to hold a court leet, or to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures, the nature of all which franchises will more particularly appear when we come to speak of the Crown's prerogatives (*a*). So also there may be a franchise to have a fair, market, ferry, or the like, with the right of taking toll there; or to have forest, chase, park, warren, or fishery. Among franchises, there are many which belong, in point of arrangement, to other parts of the present treatise; but to some more particular notice is due in this place.

1. And, first, as to *fairs*, *markets*, and *ferries*. A man may have a right to hold a fair or market, or to keep a

(*x*) *Blanchard* v. *Bridges*, (1835) 4 A. & E. 176; *Bonner* v. *Great Western Rail. Co.*, (1883) 24 Ch. D. 1.

(*y*) Finch, *Discourse*, 164.

(*z*) Co. Litt. 114; *Goodman* v. *Mayor of Saltash*, (1882) 7 App. Ca. 633.

(*a*) *Vide post*, bk. iv. pt. i. ch. vii.

[boat for the ferrying of passengers; and this either by Act of Parliament, by royal grant, or by prescription (*b*). But no other title than these will suffice; for no fair, market, or ferry can be lawfully set up without licence from the Crown (*c*). And a man may, under such titles, lawfully claim to be lord of a fair or market, though he be not the owner of the soil of the place whereon it is held (*d*); or to be the proprietor of a ferry, though he be not the owner either of the water over which it is exercised (*e*), or of the land on either side of the river (*f*). But, in such cases, he must possess over the soil such rights, at least, as will authorise him to embark and disembark his passengers thereon (*g*). The right to take toll, also, is usually (though in the case of a fair or market not necessarily (*i*)) a part of the privilege. The tolls of a fair or market are due either in respect of goods sold there, or for stallage, pickage, or the like, in respect of stalls or poles fixed in the soil (*k*). But the right of the Crown to authorise the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have had a reasonable commencement, that is to say, unless it be founded on an adequate consideration, as between the public and the grantee (*l*). This consideration, in the case of a fair or market, is the duty incumbent on the grantee to provide ground for the purpose, and to regulate the proceedings; in that of a ferry, to keep up a boat for passage over a stream not otherwise fordable. And it is also essential, that the burthen be reasonable in its amount (*m*): for where the tolls granted

(*b*) 2 Inst. 220; *Trotter* v. *Harris*, (1828) 2 Y. & J. 285.

(*c*) 2 Inst. 220; *R.* v. *Marsden*, (1765) 3 Burr. 1812.

(*d*) *A. G.* v. *Horner*, (1884) 14 Q. B. D. 245.

(*e*) *Newton* v. *Cubitt*, (1862) 12 C. B. (N.S.) 32.

(*f*) *Peter* v. *Kendal*, (1827) 6 B. & C. 703.

(*g*) *Ibid.*

(*i*) *Lord Egremont* v. *Saul*, (1837) 6 A. & E. 924; *R.* v. *Starkey*, (1837) 7 A. & E. 106.

(*k*) 2 Inst. 220.

(*l*) *Ibid.*; *Mayor of Nottingham* v. *Lambert*, (1738) Willes, 116.

(*m*) 2 Inst. 220.

[are outrageous, the franchise is illegal and void (*n*). It is, however, to be remarked, that, when any one of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but also against those who disturb his franchise by setting up a new fair, market, or ferry, so near to his as to diminish his custom (*o*); while, on the other hand, he is himself liable to be criminally indicted, if by his wilful act, or even by his neglect of duty, the subjects of the realm are obstructed in their lawful use of the franchise (*p*).] And we may also observe, that the legislature has, more especially of recent years, enacted divers provisions for the establishment and subsequent regulation of fairs and markets; which provisions are either of a general applicability to all fairs and markets (*q*), or relate exclusively to some particular institution, *e.g.*, the Greenwich market (*r*) or the market at Smithfield (*s*). Some of these enactments prescribe the days for holding the market (*t*); and others of them provide for the abolition of certain fairs (*u*), and for the suppression of fairs that are deemed unlawful (*x*).

[2. Secondly, as to the franchises of *forest*, *chase*, *park*, *warren*, and *fishery*. A *forest* is the right of keeping, for the purpose of venary and hunting, wild beasts and fowls of forest, chase, park, and warren, in a certain territory or precinct of woody ground or pasture set apart for the purpose (*y*). By our law, no man can make title to animals *feræ naturæ*, being and remaining wild; and though a man may take or kill on his own lands animals

(*n*) Stat. Westm. I. (1275) cc. 3, 31; 2 Inst. 219.

(*o*) *Mayor of Dorchester* v. *Ensor*, (1869) 39 L. J. (Ex.) 11.

(*p*) Willes, 512 (n.).

(*q*) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*r*) 12 & 13 Vict. c. 28.

(*s*) 14 & 15 Vict. c. 61.

(*t*) Fairs Act, 1873.

(*u*) Fairs Act, 1871.

(*x*) Metropolitan Fairs Act, 1868.

(*y*) Co. Litt. 233 a; Manwood, *Laws of the Forest*, (ed. 1665) 41.

[*ferœ naturæ*, (so that he invade not any exclusive franchise of sporting which another person may possess over the same lands,) yet he is not at liberty to confine beasts of venary in a wild state within a particular precinct, for the mere purpose of diversion, even though on his own soil; for this is in the nature of an unlawful monopoly (*z*). And this is so, notwithstanding that some kinds of animals *ferœ naturæ*, such as deer, rabbits, and the like, may be lawfully kept by any person in an enclosed place, if preserved as *property*, and not merely for the purpose of the chase (*a*). But the right to keep up animals in a wild state for mere diversion, though forbidden to the subject, has been at all times admitted as a matter of prerogative in the Crown; for we find, that even among the Saxons there were woody and desert tracts called forests, which were filled with great game, reserved by the king for his own pleasure, and protected by heavy pecuniary penalties. And, upon the Conquest, the Norman monarchs exceeded even their predecessors in their enjoyment of this prerogative. For not only did they extend the limits of the antient forests by encroachment on the lands of their subjects, but they established a particular system of *forest law*, which was apparently of a most tyrannical and oppressive character; so that our ancestors were as zealous for the reformation of the forest laws as for the relaxation of the other feudal rigours, and struggled for the *Carta de Forestâ*, as strenuously as for the Great Charter itself. By the *Carta de Forestâ*, which was confirmed in Parliament in the ninth year of Henry the Third, many forests unlawfully made (or at least many precincts added by unlawful encroachment to the antient forests) were *disafforested* (*b*), though in the case of such precincts, called thenceforward *purlieus*, the Crown still continued

(*z*) *Case of Monopolies*, (1602) 11 Rep. 87 b; 2 Inst. 199.

(*a*) *Davies* v. *Powell*, (1738) Willes, 48; *Morgan* v. *Abergavenny*, (1849) 8 C. B. 768.

(*b*) Cc. 1, 3.

[to exercise certain of its privileges (*c*); and in the forests that remained entire, many abuses were reformed, and the severity of punishments was mitigated. And now, by reason of the variety of statutes afterwards made for the amelioration of the forest laws, this branch of the prerogative has long ceased to be a grievance to the subject. Many of the royal forests, however, still exist; and of them some are of a known origin, such as the New Forest in Hampshire, founded by the Conqueror, that of Windsor by Henry the Eighth, and that of Richmond by Charles the First, while others of them are of such remote antiquity, that no trace is said to remain in history of their first creation. Of these latter we may instance the forest of Epping, the forest of Hainault, the forest of Whichwood, the forest of Whittlewood, the forest of Woolmer, the forest of Delamere, and the forest of Dean. It is said that, at one time, there were, in England alone, sixty-nine royal forests (*d*).

A forest, although a royal possession, is capable of being vested in a subject (*e*); for if the sovereign grants a forest to a private person, with words expressly authorising the administration of forest law there, the grantee will have the franchise of a *forest* to its full extent, with all the appropriate courts and officers (*f*). And such a forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or in the lands of another (*g*). And in this respect, it differs from a right of common and the other incorporeal hereditaments above described; for these rights of common, as they issue out of the soil, cannot exist in the same man who is owner of the soil itself, (the latter title superseding all inferior claims like these,) and are consequently rights which a man can claim to exercise only *in alieno solo*. But a forest, and

(*c*) 4 Inst. 303, 304.
(*d*) *Ibid.* 319.
(*e*) Co. Litt. 233 a.
(*f*) *Case of Leicester Forest*, (1607) Cro. Jac. 155.
(*g*) 4 Inst. 301, 318; *Sutton* v. *Moody*, (1697) Ld. Raym. 250; *Robinson* v. *Duleep Singh*, (1879) 11 Ch. D. 834.

[indeed all franchises in general, are inheritances collateral to the ownership of the land (*h*), and may be claimed by a man either *in proprio solo* or *in alieno solo*. The owner of a forest is also considered (notwithstanding the general rule that title cannot be made to things *feræ naturæ*) as having a qualified property in the wild animals of chase and venary there found, so long as they continue there; and no other person can lawfully take them within those precincts, or chase them from thence and take them in other grounds (*i*). But if a wild animal strays from the forest, it ceases to be the property of the owner of the franchise, and will belong to the first taker.

A *chase* is a franchise granted by the Crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase, which in a legal sense are the same with those to which the right of forest extends (*k*); but the franchise does not authorise the establishment of forest law within such precinct (*l*).

A *park* properly signifies an inclosure, and is popularly applied to any ground which a gentleman chooses to surround with a wall or paling, and to stock with a herd of deer; but in the technical sense in which we now use the term, a park is nearly equivalent to a chase, being in effect no other than a chase *inclosed* (*m*).

A *free-warren* is a similar franchise (*n*), granted by the Crown to a subject, for preservation or custody of beasts and fowls *of warren*; which, according to Lord Coke, are "hare, coney, roe," "partridge, quail, rail, &c.," "pheasant, woodcock, &c.," "mallard, heron, &c.," (*o*); but "grouse" are not fowls of warren (*p*). To this, as well as to chase

(*h*) 4 Inst. 318.

(*i*) *Sutton* v. *Moody*, (1697) Ld. Raym. 251.

(*k*) Co. Litt. 233 a.

(*l*) Manw. 52.

(*m*) *Ibid.*

(*n*) See Bro. Ab. *Warren*; Co. Litt. 2 a, 114 b; *Sutton* v *Moody*, *ubi sup.*

(*o*) Co. Litt. 233 a; Manw. 95.

(*p*) *Duke of Devonshire* v. *Lodge*, (1827) 7 B. & C. 36.

[and park, apply generally the principles which have been before noticed in respect of a forest; with this exception, however, as to a park, that it is incapable of being claimed *in alieno solo*, and can exist only in land belonging to the owner of the franchise himself.

A *free fishery*, or the exclusive right of fishing in a public river, is also a royal franchise. In private rivers (viz., in those not navigable), as the bed or soil, so the right of fishing presumably belongs to the owners of the land on either side, and to them only (*q*); but in those which are public, that is, navigable, while the bed (so far at least as the tide flows) appertains to the Crown, the right of fishing belongs *primâ facie* to the public at large (*r*). But either in public or in private rivers, there may be a particular title in some individual, by which the presumptive right may be excluded; and this may take place, in a public river, by force of some royal grant, or of some prescription entitling a private person and his heirs to the exclusive right of fishing therein (*s*), a privilege which is called in the books a "free fishery" (*t*), and sometimes a "several fishery" (*u*). Grants of this description can no longer be made by the Crown (*x*), being prohibited by King John's great charter (*y*), and the second and third confirmations of it in the reign of his successor, whereby also the right of making *weirs* in our public rivers was restrained (*z*). But the right of making such grants, prior to its prohibition, was considered as one of the flowers of the prerogative; and it is from this origin that the validity of a free fishery at the present day must in every case be derived. If

(*q*) Hale, *De Jure Maris*, ch. 1.

(*r*) Hale, *ubi sup.* c. 3; *Carter* v. *Murcot*, (1768) 4 Burr. 2163.

(*s*) *Carter* v. *Murcot*, *ubi sup.*

(*t*) *Seymour* v. *Courtenay*, (1771) 5 Burr. 2814.

(*u*) *Holford* v. *Bailey*, (1849) 13 Q. B. 446. (A "several fishery" excludes the rights of others; a "free fishery" does not.)

(*x*) *Duke of Somerset* v. *Fogwell*, (1826) 5 B. & C. 875.

(*y*) Cap. 47 (ed. Stubbs).

(*z*) Cap. 33.

[a free fishery should have fallen to the Crown by forfeiture, it may, *semble*, be re-granted (*a*). Free fishery, it need hardly be observed, is a franchise, and is wholly different from the right of *common of piscary* formerly mentioned, the latter not being a franchise at all, but a right created by the grant of a subject. Also, in a free fishery, a man has a qualified property in the fish before they are caught; while in a common of piscary, he has no property at all till capture (*b*).

VI. *Rents* (including *annuities*) are the last species of incorporeal hereditaments that we propose to notice in this place. The word rent (*reditus*) signifies a compensation or return, of a certain amount, yielded periodically out of the profits of some corporeal hereditament, by the tenant thereof. First, it is *yielded*, that is, paid as a thing due; and therefore it is said, by the antient lawyers, to *lie in render*, in contradistinction to those incorporeal hereditaments, (as common or the like,) which the party entitled thereto is merely authorised to take for himself, and which are, consequently, said to *lie in prender*. Second, it is of certain amount, or that which may be reduced to certainty by either party; for *certum est quod certum reddi potest* (*c*). Third, it is payable periodically, as yearly, or in every second, third, or fourth year, or the like (*d*). Again, it is considered as payable out of the profits of the land, and must consequently not be part of the land itself (*e*); wherein it differs from an exception in a grant, which is always part of the thing granted. So there cannot be reserved, by way of rent, the vesture or herbage of the land demised (*f*); though there is no occasion for rent to be, (as it usually is,) a sum of money. For spurs, capons, horses, corn, and other matters may

(*a*) *Mayor of Colchester* v. *Brooke*, (1846) 7 Q. B. 385.
(*b*) *Smith* v. *Kemp*, (1692) Holt. 322.
(*c*) Co. Litt. 142 a.
(*d*) *Ibid.* 47 a.
(*e*) *Ibid.*, 141 b, 142 a.
(*f*) *Ibid.*

[be rendered by way of rent (*g*). Moreover, rent must, as the general rule, issue out of hereditaments *corporeal;* therefore a rent cannot be reserved out of a common, a franchise, or the like (*h*), or generally out of any incorporeal hereditament. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved (*i*). And, lastly, the person from whom rent is due must be the tenant of the land; but his tenancy may be either in possession, remainder, or reversion. For a rent may be as well reserved upon the grant of a reversion or remainder, as on the conveyance of an estate in possession (*k*).

There were known to the common law three manner of rents, viz., rent-service, rent-charge, and rent-seck (*l*). *Rent-service* is where the rent accrues in connection with a tenure, attended (as tenure almost invariably is) by fealty, or by fealty and other services (*m*); and this whether the party to whom the rent is due be entitled to fealty as having the reversion of the land out of which the rent issues, or as having the mere seignory. Thus if A., seised in fee, make a gift of land to B. in tail, or demise to him for life, or years, reserving a rent; or if B. be seised in fee of a tenement holden of A. as lord of a certain manor, at a certain antient rent, such rent is, in either case, rent-service, for it is due as from a tenant owing fealty to his lord. To rent of this description the common law attaches as of common right, and independently of any express provision for that purpose between the parties, the power of *distress* which was incident to the fealty due by the tenant to his landlord (*n*). That is, the lord is entitled, in the event of the rent falling into arrear, to enforce payment without legal process, by entering upon the land, and seizing the goods and

(*g*) *Ibid.*
(*h*) *Ibid.* 144 a, 47 a.
(*i*) *Lord Hastings* v. *N. E. Ry. Co.* [1898], 2 Ch. 674.
(*k*) Co. Litt. 47 a, 142 a.
(*l*) Litt. s. 213.
(*m*) *Ibid.*; Co. Litt. 142 a.
(*n*) Litt. s. 214.

[chattels found thereon. And this common law right of distress attaches even to the rent payable by a tenant at will; although, by reason of there being no fealty in such a case, such rent is not properly a rent-service (*o*).

A *rent-charge* is where the owner of the rent has neither seignory nor reversion, and can consequently claim no fealty; yet is entitled to distrain by force of an express contract. As where a man by deed conveys to another his *whole* estate in fee simple, with a certain rent payable to him thereout, and adds to the deed a covenant or clause of distress, viz.—that, if the rent be in arrear, it shall be lawful to distrain for the same (*p*); or where a man by deed grants out of the land whereof he is seised a certain rent payable to another, with a like cause of distress (*q*). In either of these cases the land is liable to the distress, not of common right, but by virtue of the clause in the deed. And therefore it is called a rent-charge, because in this manner the land is *charged* with a distress for the payment of it (*r*).

A *rent-seck* (*reditus siccus*) is where the owner of the rent has neither seignory nor reversion, nor any such express power of distress as the owner of a rent-charge has; and in any of the cases of rent-charge we have just mentioned, if no clause of distress were inserted in the deed, the rent would, at the common law, be rent-seck (*s*).

There are also other species of rents mentioned in the books; but they are all reducible to one or other of the three above enumerated. *Rents of assize* are the certain established and antient rents of the freeholders and copyholders of a manor (*t*); and these antient rents cannot be departed from or varied. Those of the freeholders are frequently called *chief rents* (*reditus capitales*); and both sorts are indifferently denominated *quit rents* (*quieti reditus*), because thereby the tenant goes quit and free of

(*o*) Litt. s. 72.
(*p*) *Ibid.* s. 217.
(*q*) *Ibid.* s. 218.
(*r*) *Ibid.* s. 217.
(*s*) *Ibid.* ss. 217, 218.
(*t*) 2 Inst. 19.

[all other services. When these payments were received in silver or white money, they were antiently called white rents or *blanch ferms* (*reditus albi*), in contradistinction to rents reserved in work, grain, &c., which were called black mail (*reditus nigri*) (*u*).] Quit rents are rent-service; from which it follows that the lord is entitled, as of common right, to distrain for them when they fall into arrear. *Rack rent* is a term expressive only of the proportion a rent bears to the value of the tenement on which it is charged, or in respect of which it is reserved; the rent being so termed when it is of the full value of the tenement, or near it. A *fee farm rent* is a rent-charge issuing out of an estate in fee, and occurs where an estate in fee is granted subject to a rent in fee, of at least one-fourth of the value of the lands at the time of its reservation (*x*); a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method of letting them for life or years. But it results from former explanations, that such a rent, if created by a subject since the statute of *Quia Emptores*, can never be a rent-service; for no fealty can be due to the grantor.

These are the general divisions of rent; but, though their correct apprehension is still of importance, the differences which formerly existed as to the remedies to be pursued in case of their non-payment are, for practical purposes, nearly at an end. For it has been provided by the Landlord and Tenant Act, 1730, s. 5, that any rent-seck, rent of assize, or chief rent, may be recovered by the remedy of distress in the same manner as if such rent had been reserved upon a lease. But this provision, though still unrepealed, has been virtually superseded by the Conveyancing Act, 1881 (*y*), which in sect. 44 enacts, that any annual sum, whether charged on land or on the income of land, and whether payable half-yearly or other-

(*u*) 2 Inst. 19.
(*x*) Co. Litt. 143 b.
(*y*) 44 & 45 Vict. c. 41.

wise (not being rent-service incident to a reversion), may, when in arrear twenty-one days, be recovered by distress; and, when in arrear for forty days, may be recovered either by entry upon and perception of the profits of the land, or by means of a demise of the land to a trustee for a term of years, upon trust (by mortgage, sale, or otherwise) to raise the arrears, together with the expenses. But these powers are applicable only where the document creating the rent comes into operation after the 31st December, 1881, and they may be excluded by agreement of the parties, expressed in the instrument creating the charge. This same statute also, by sect. 45, makes an important alteration in the law, by providing that a quit-rent, chief-rent, perpetual rent-charge, or other perpetual annual sum issuing out of land (not being tithe-rent-charge, or rent reserved under a lease or upon a sale or building grant), whensoever created, may be redeemed at the option of the owner (or part-owner) of the land, upon payment or tender to the owner of the rent (being an absolute owner or an owner otherwise competent to give a receipt therefor) of the amount certified, as the price of redemption, by a certificate of the Board of Agriculture, to be obtained by the landowner desirous of redeeming the rent. The latter is to give the owner of the rent one calendar month's notice of his intention to pay or tender such amount for the redemption of the rent; and, on proof of such payment or tender, so made after such notice as aforesaid; the Board grants its certificate of redemption, and the land is thereupon and thereby absolutely freed and discharged of the rent.

[Rent is due and payable upon the land from which it issues; that is, if no particular place be mentioned in the reservation (*z*). But, in the case of the king, the payment may be either to the Crown officers at the Exchequer, or to a receiver in the country (*a*). And,

(*z*) Co. Litt. 201 b.

(*a*) *Borough's Case*, (1596) 4 Rep. 7

[strictly, rent is demandable and payable before the time of sunset of the day whereon it is reserved (*b*); though some have said that it is not absolutely due till midnight (*c*).]

By the common law, if the estate or interest of the person entitled to the rent came to an end in the interval between one of the days of payment and another (as where it determined by death, supposing the lessor to have been tenant for life), the periodical sum then accruing was entirely lost to him and his representatives (*d*); and, supposing the rent itself not to determine, but to continue payable to some person in remainder or reversion, the whole sum accruing in respect of such interval would have belonged to that person, though the greater portion of such period might have elapsed in the time of his predecessor. But, as we have said in a former chapter (*e*), it has now been provided by the Apportionment Act, 1870, which repeals but re-enacts with amendments certain prior Acts, that, after the passing of that statute, all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall be considered as accruing from day to day, and shall be *apportionable* in respect of time accordingly. The apportioned part of the same is, however, only payable (in the case of a continuing rent, annuity, or other such payment) as soon as the entire portion of which it forms a part shall become due, and not before, and (in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise) as soon as the next entire portion would have been payable, and not before. The entire or continuing rent (including such apportioned part) is still recoverable by the heir or other person who, had the rent not been apportionable, would have been

(*b*) Co. Litt. 202 a.

(*c*) *Lord Rockingham* v. *Penrice*, (1711) 1 P. Wms. 178.

(*d*) *Jenner* v. *Morgan*, (1717) 1 P. Wms. 392.

(*e*) Bk. ii., pt. i., ch. iv.

entitled to the accruing portion; but the apportioned part is afterwards recoverable by action from such heir or other person, by the executors or other persons entitled under the Act to claim the same.

Where the tenant under a lease has been lawfully evicted of part of the land demised, and out of which the rent issues; or where part of the land demised, and out of which the rent issues, has been surrendered by the tenant to the lessor; or where the lessor has aliened the reversion as to part; in all these cases, the rent must be apportioned, and so much of it only will be payable to the lessor as corresponds with the value of what is still held by the tenant under him (*f*). But where the tenant has been tortiously expelled by the act of the landlord himself, even from a part of the premises only, there will be no apportionment; but the whole rent will be suspended so long as the expulsion continues (*g*).

Annuities, unlike rents, are not payable out of land, though they may be chargeable upon land by express agreement. On the other hand, they bind the person of the grantor, and his estate will, indirectly, thus become liable to satisfy them. By a somewhat curious anomaly, an annuity, though personal, may be made payable to a man *and his heirs;* and may therefore be a hereditament. But it is not a *tenement;* and therefore it cannot be entailed (*h*).

As regards incorporeal hereditaments, generally, we may remark, that many of them are (as was explained in speaking of commons (*i*)) capable either of being annexed as an accessory to some hereditament corporeal, or of existing independently and *per se;* being described, in the former case, as *appendant* or *appurtenant*, in the latter, as *in gross*. Where the connection of principal and

(*f*) Co. Litt. 148 a.

(*g*) *Morrison* v. *Chadwick*, (1849) 7 C. B. 283.

(*h*) Co. Litt. 144 b; 20 a.

(*i*) *Ante*, pp. 395—397.

accessory exists, the effect is, that the thing appendant or appurtenant will pass (without any particular mention of it) by any conveyance or alienation of the land to which it is annexed; and this whether the land be conveyed "with its appurtenances" or not (*k*). But if the principal be expressly conveyed without the accessory, or the accessory without the principal, as in some instances may be done, the accessory becomes thereafter, in either case, a thing in gross.

Incorporeal hereditaments are not, in any strict and proper sense, the subjects of *tenure*, like those of the corporeal kind (*l*); but similar *estates* may be had in incorporeal as in corporeal hereditaments (*m*). And in many respects, they are upon the same footing with regard to *title*, even where title depends upon an actual *seisin* or occupation; *e.g.*, the rule *seisina facit stipitem* had in general the same application to things incorporeal as to things corporeal, that is to say, it governed all descents which took place on a death prior to the 1st of January, 1834. For, if a man who died before that day had what is *equivalent* to corporeal seisin in hereditaments that were incorporeal,—if, for example, in the case of a rent, he had obtained the actual receipt of it—such constructive seisin made him the root of *descent* with respect to these hereditaments, though he was not himself the purchaser (*n*). So, hereditaments of the latter as well as of the former description fall within the doctrine of *special occupancy*. For, though it seems that at common law there could be no title by *common* occupancy to things of which no corporeal or actual seisin could be had, yet the heir might have taken as *special* occupant (*o*). And incorporeal hereditaments are now expressly included in all the legislative provisions with

(*k*) Conveyancing Act, 1881, s. 6. (The effect of this section is somewhat doubtful.)

(*l*) Co. Litt. 20 a.

(*m*) They may even, in many cases, be entailed (Co. Litt. 20 a).

(*n*) *Ibid.* 156.

(*o*) *Hassell* v. *Gowthwaite*, (1744) Willes, 500; *Bearpark* v. *Hutchinson*, (1830) 7 Bing. 186.

respect to estates *pur auter vie*, which we had occasion to notice in a former part of the work (*p*).

On the other hand, in some important particulars, the law of title to incorporeal things differs from that which applies to thing corporeal. The former cannot in their nature pass by *feoffment*, but have always been capable of passing by *grant* (*q*); and therefore they were said (like remainders and reversions of hereditaments corporeal) to *lie in grant* and not *in livery*. And they would also pass by means of a surrender by deed (*r*), and by any conveyance operating under the Statute of Uses; for existing incorporeal hereditaments might be limited by way of use, and were executed by that statute accordingly (*s*). And now, by the Conveyancing Act, 1881, s. 62, easements, liberties, and other rights over land may even be created *de novo* by way of use.

But it is not by grant alone that title may be made to an incorporeal hereditament. For, first, they may be created by *reservation* in a lease or other conveyance; as where a man seised in fee demises land to another for life or years, reserving a right of way or other easement. Second, there are certain so-called incorporeal hereditaments which may be claimed by *custom*, as for all the inhabitants of a certain hamlet to have a right of way over a certain field for a particular purpose; but no man can by custom claim a *profit à prendre* in the land of another (*t*). Besides which titles, there is, third, also the claim by *prescription*, which applies to almost every kind of incorporeal hereditament, as well to those which are appendant or appurtenant, as to those which are in gross.

The subject of Prescription demands special consideration. And first, it is to be distinguished from custom;

(*p*) *Vide sup.* pp. 255—257.

(*q*) 2 Sand. *Uses*, 330.

(*r*) Co. Litt. 338 a.

(*s*) The decision in *Beaudely* v. *Brooke*, (1607) Cro. Jac. 189, only decided that they could not be *created* by way of use.

(*t*) *Gateward's Case*, (1607) 6 Rep. 59 b. (This rule, however, does not apply to copyholders claiming profits in the waste of a manor.)

custom being properly a *local* usage, and prescription being a *personal* one, attaching to a man and his ancestors, or to those whose estate he has (*u*). [For example, if there be a usage time out of mind in the parish of Dale, that all the inhabitants of that parish may dance on a certain close at all times for their recreation,—which is held to be a lawful usage,—this is strictly a custom. For it applies to the *place* in general, but not to any particular *person*. But if the tenant who is seised of a certain tenement in fee alleges that he and all those whose estate he hath in the said manor have used, *time out of mind*, to have common of pasture in such a close, this is properly called a prescription, being a usage annexed to the *person* of the owner of this estate.]

Second, prescription is to be considered in two distinct points of view; as it exists at the common law, and as it exists under the Prescription Act, 1832. For the latter Act, though it has profoundly modified the application of the common law, has yet by no means abolished it.

[First, with respect to prescription *at common law*. The following points appear principally to deserve attention:—1. This title is always founded on the actual enjoyment of the thing in question; and a mere claim, however often repeated or long continued, and whether its validity has been questioned or not, will not suffice to establish a prescriptive right. Moreover, the measure of the actual enjoyment is in general the measure of the right (*x*). 2. The enjoyment on which a prescription is founded, must have been constant and peaceable; for as a general rule, when it has been subject to interruption or to dispute, no title by prescription arises. Yet, where the right is shown to have once attached in consequence of an

(*u*) Co. Litt. 113 b; *Gateward's Case*, *ubi sup.*

(*x*) Co. Litt. 113 b; *Manifold* v. *Pennington*, (1825) 4 B. & C. 161; *Jones* v. *Richards*, (1837) 6 A. & E. 532. (The cases quoted by the learned author do not quite bear out his proposition, which is, however, no doubt, correct.—E. J.)

[uniform and tranquil usage for a sufficiently long tract of time, a wrongful interruption of the enjoyment during a subsequent period of comparatively short duration (as for ten or twenty years) will not destroy the prescription (*y*). 3. As to the length of time sufficient to establish the right, the rule of the common law is, that there must have been a usage *from time immemorial*, or, as it is technically termed, *from time whereof the memory of man is not to the contrary*, which period (as before shown in our remarks upon *custom*) refers to so remote an era as the beginning of the reign of Richard the First (*z*). And therefore, if the usage can be shown to have commenced at any time since that period, the prescription (where it is claimed at common law) is destroyed (*a*). But a commencement shown prior to the reign of Richard the First would constitute no objection; for all time prior to that era is considered as out of the range of legal memory. Also, supposing no evidence to be given as to the time at which the usage commenced, but that it appears, either by the testimony of living witnesses, or by other means of proof, that it has had continuance for a period of *twenty years* or more, this will in general amount, at common law, to a presumption that it is immemorial; so far, at least, as to sustain the prescription, supposing no circumstances of a contrary tendency to appear (*b*). And even proof of a shorter continuance than twenty years will have the same effect, if corroborated by other attendant circumstances indicative of the existence of an antient right (*c*). But the presumption of immemorial right, that would otherwise arise from an enjoyment of twenty years, will be defeated by showing that such enjoyment took place by virtue of a grant or licence from the party

(*y*) Co. Litt. 114 b; 2 Inst. 653; *Hall* v. *Swift*, (1838) 4 Bing. N. C. 381.

(*z*) Co. Litt. 115 a. (The doctrine seems to have been doubted by Littleton, s. 170.)

(*a*) *Bryant* v. *Foot*, (1868) L. R., 3 Q. B. 497.

(*b*) *Angus* v. *Dalton*, (1881) L. R. 6 App. Ca. 779.

(*c*) Stark. Ev. 1217, 1st ed.

[interested in opposing it, or that the enjoyment was without his knowledge during the whole time that it was exercised (*d*). 4. Every prescription must be both certain and reasonable. Therefore, a prescription to pay for tithes one penny *or thereabouts* for every acre of arable land, or to take as much clay *as shall be required* for making bricks at a certain kiln out of another's field, is bad in law (*e*); and thus, too, a surplice fee claimed on marriage was held unsustainable, on the ground that, according to the value of money at the supposed origin of the prescriptive right, it was *excessive in amount* (*f*). 5. All prescription at common law must be laid either in a man and *those whose estate he hath* in certain lands (as in the example above given of a prescriptive common of pasture), which is called prescribing in a *que estate*; or it must be in a man *and his ancestors*. And here this distinction is to be made—that if a man prescribes in a *que estate*, nothing is claimable by this prescription, but such things as are incident (appendant or appurtenant) to lands. For it would be absurd to claim anything as the consequence or appendix of an estate with which the thing claimed has no connection. But, if a man prescribes in himself and his ancestors, he may prescribe for anything whatever that might be the subject of grant (*g*). 6. A prescription in a *que estate* must, also, always be laid in him that is tenant of the fee; and therefore a tenant for life, for years, or at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*h*). For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything whose estates commenced within the remembrance of man. And, therefore, the tenant for life must prescribe under cover of the tenant in fee simple. As if tenant for

(*d*) *Bright* v. *Walker*, (1834) 4 Tyr. 502. (But this was a decision on the Prescription Act.)

(*e*) *Clayton* v. *Corby*, (1843) 5 Q. B. 415; *Hilton* v. *Granville*, (1844) *ibid.* 701.

(*f*) *Bryant* v. *Foot*, (1868) L. R. 3 Q. B. 497.

(*g*) Co. Litt. 121 a.

(*h*) 4 Rep. 31, 32.

[life of a manor would prescribe for a right of common, as appurtenant to the same, he must allege that John Stiles was seised in fee of the manor; and that he, and all those whose estate he had, had immemorially used to have this right of common appurtenant to the said manor; and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 7. A prescription cannot lie for a thing which could not be raised by grant, for the law allows prescription only to supply the loss of a grant; and therefore every prescription presupposes a grant to have existed. Thus, the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for such claim could never have been good by grant, and therefore it shall not be good by prescription (*i*). 8. Another rule is, that what is to arise by matter of record, cannot be prescribed for—for instance, the right to the goods of felons; for forfeitures, while they existed, not being due until the matter on which they arose was found by the inquisition of a jury, and so made a matter of record, the forfeiture itself could not be claimed by any inferior title (*k*). But the franchises of treasure trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record (*l*). 9. Lastly, a person having title to anything by prescription, is not to be considered as being himself the purchaser, so as to make it descendible to his heirs general, according to the ordinary rule of inheritance; for prescription is rather to be considered as evidence of a former acquisition, than as an acquisition *de novo*. And the rule is, that where a man prescribes for (say) a right of way in himself and his *ancestors*, the right will descend only to the blood of that line of ancestors in whom he so prescribes; but if he prescribes in a *que estate*, the right will follow the

(*i*) *Potter* v. *North*, (1674) 1 Vent. 387.

(*k*) Co. Litt. 114 a.; *Case of Abbot of Strata Marcella*, (1591) 9 Rep. 24 a.

(*l*) Co. Litt. 114 b.

[nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase. For every accessory followeth the nature of its principal.] And note, that a *right* arising in one or more persons by prescription may give rise to a prescriptive *liability* in another or others, *e.g.*, the liability attaching by prescription to the sea frontagers in Essex, to repair the sea-walls there (*m*).

The Prescription Act, 1832, which is described as an Act "for shortening the *time* of prescription in certain cases," is commonly said to have originated in a reasonable dissatisfaction with the rule, which required an enjoyment from "time immemorial" as the foundation in every case of a prescriptive right; for the effect of that rule was, that while, in general, an enjoyment for even *twenty* years sufficed to sustain a claim by prescription, yet, if accident should supply the adverse party with the means of proving that at any period subsequent to the commencement of the reign of Richard the First the alleged right did not in fact exist, the claimant would have been defeated, even though he could prove that the usage had lasted for centuries. It was chiefly to obviate that inconvenience that the Act was passed; but, incidentally, the Act made so many other alterations in the law, that a summary of its provisions will be useful.

First, with respect to rights of common and other profits *à prendre in alieno solo*, the Act provides (*n*) that where there shall have been an enjoyment of them by any person claiming right thereto, without interruption, for *thirty* years next before the commencement of any action upon the subject (*o*), the claim shall no longer be defeated, by showing only that the enjoyment commenced at a period subsequent to the era of legal memory; but

(*m*) *The Queen* v. *Commissioners of Sewers for Essex*, (1885) 14 Q. B. D. 570.

(*n*) Sect. 1.

(*o*) Sect. 4.

the claim may be defeated in any other way in which it was defeasible before the statute passed, so that, *e.g.*, a case of thirty years' enjoyment would still be satisfactorily answered, by showing that the enjoyment was without the knowledge of the adverse party, or that it was by his mere licence or permission. And nothing is to be deemed an *interruption* of the right, unless it shall have been submitted to or acquiesced in for the space of one year (*p*); a mere cessation of the enjoyment being neither an interruption nor a discontinuance of the right (*q*). The Act also provides, that the time during which the adverse party shall have been an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action as to the claim shall have been pending and diligently prosecuted, shall be excluded in the computation of the period of thirty years (*r*); but that where there has been an enjoyment for *sixty* years, the claim shall be absolute and indefeasible, unless proof is given that the enjoyment took place under some consent or agreement *in writing*, expressly given for the purpose (*s*). And in addition to these regulations as to the time for a prescription, there are others as to the manner of making it, and among them the following, that he who prescribes under the Act shall not be required in any case to claim *as in right of the owner of the fee* (*t*); and that, as regards *time*, no time falling short of the full time prescribed by the Act shall raise any presumption of right under the Act.

Second, with regard to ways and other easements, watercourses and the use of water (*u*), the Act contains similar provisions; but the periods conferring a prescriptive right in the case of ways and other easements, watercourses and waters, are *twenty* and *forty* years (in

(*p*) Sect. 4.
(*q*) *Hollins* v. *Verney*, (1884) 13 Q. B. D. 304.
(*r*) Sect. 7.
(*s*) Sect. 1.
(*t*) Sect. 5.
(*u*) Sect. 2.

lieu of thirty and sixty years) respectively. When the land or water as against which the claim is made has been held for a term of life or for a term exceeding three years, such term is to be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term expires (*x*). As regards the valuable easement of lights, the uninterrupted enjoyment of these for *twenty* years constitutes at once an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding; but, of course, even as regards lights, the claim may be defeated by showing that the enjoyment took place under some agreement in writing (*y*).

Referring to the statement made a short time ago (p. 421), to the effect that the passing of the Prescription Act has by no means abolished the old rules of the common law, we may point out that the Act, as its preamble shows, was passed with limited and definite objects. Where, therefore, its provisions are not inconsistent with the rules of common law (as, for example, in the enactment (*z*) that user for a shorter than the statutory period will not raise any presumption in favour of a claim), those rules will, it is presumed, still apply. And the Act itself expressly excludes from its operation claims to *tithes, rents, and services;* so that, at any rate as to the two last, the rules of prescription at the common law will still apply (*a*). It has also been held, that claims to profits *in gross* are not within the Act (*b*).

(*x*) Sect. 8. (A curious omission in this section has raised a doubt as to whether it applies to easements other than ways and watercourses. It obviously does not apply to *profits à prendre.*)

(*y*) Sect. 3. (This section, unlike the others, does not bind the Crown. *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48.)

(*z*) Sect. 6.

(*a*) Sect. 1. (Prescriptive claims to exemption from tithes are regulated by the Tithe Act, 1832.)

(*b*) *Shuttleworth* v. *Le Fleming*, (1865) 19 C. B. (N.S.) 687. [A curious rule of evidence has recently been laid down by the Charitable Trusts (Recovery) Act, 1891, to the effect that, when the Charity Com-

Incorporeal hereditaments are capable of *extinction*. This may be effected by a *release* (*c*), as when a person, entitled to a common, releases the right of common to the owner of the soil over which it is claimed. But they may also be extinguished by abandonment or non-user; and, after disuse for twenty years, a release will in general be presumed (*d*). Incorporeal hereditaments may also be extinguished by *unity of seisin*, as where the person entitled to a way or common becomes seised in fee of the land which is subject to the right; for the dominion of the soil itself, and of an incorporeal right relating to the same soil, cannot, in general, subsist together in the same individual. But franchises are an exception to this rule: for these, as before remarked, are of a nature *collateral* to the inheritance itself, and are consequently not affected by any unity of seisin (*e*); although franchises also may, in certain cases, be extinguished, *e.g.*, by a reunion with the Crown, or by forfeiture for *misuser*, or for *non-user*. Formerly easements and profits did not *escheat*, but, on the death, intestate and without heirs, of their owners, became extinct for the benefit of the servient tenements. But now, by the Intestate Estates Act, 1884, the law of escheat is to apply to incorporeal hereditaments.

missioners are suing to recover a "yearly or periodical payment made in respect of any land," on behalf of a charity, proof of render for twelve consecutive years shall be *primâ facie* proof of the title of the charity to payment of the sum in perpetuity.]

(*c*) Co. Litt. 280 a.

(*d*) *Seaman* v. *Vawdrey*, (1810) 16 Ves. 390; *Moore* v. *Rawson*, (1824) 3 B. & C. 332.

(*e*) 4 Inst. 318.

CHAPTER XXIV.

THE CONVEYANCING AND SETTLED LAND ACTS, 1881 TO 1892.

As has already been indicated, many statutes relating to the law of real property were passed during the earlier part of the nineteenth century. These generally were designed for the purpose of releasing freeholds from the bondage of antient customs, and depriving them of the benefits of feudal privileges. Fines and recoveries as modes of conveyance were abolished, fee simple lands were made assets for the payment of their deceased owner's debts, and all interests in them were made freely alienable during their owner's life by deed of grant without livery, and on their owner's death by his will attested by two witnesses.

These have already been sufficiently discussed. But there was another series of important statutes passed in the latter part of the same century which we have not yet fully considered. This series was passed mainly with the object of facilitating what has been called free trade in land. The chief of these are the Vendor and Purchaser Act, 1874, the Settled Estates Act, 1877, the Conveyancing Acts, 1881 to 1892, the Settled Land Acts, 1882 to 1890, and the Land Transfer Acts, 1875 and 1897 (*f*).

The Land Transfer Acts, 1875 and 1897, introduced an entirely new system of conveyancing, and a separate chapter will be devoted to them. The other Acts effected a revolution in the old system of conveyancing and in the

(*f*) These Acts will be shortly referred to in the discussion of their provisions as follows : V. & P. Act, 1874 ; S. E. Act, 1877 ; Con. Acts, 1881—1892 ; S. L. Acts, 1882—1890 ; L. T. Acts, 1875 and 1897.

position of a tenant for life of settled land. It will be convenient to deal first with those directly affecting conveyancing; and to devote the remainder of this chapter to the Settled Land Acts, 1882 to 1890, which form a sort of code in themselves.

PART I.—THE CONVEYANCING ACTS, ETC.

The Vendor and Purchaser Act, 1874, and the Conveyancing Acts, 1881—1892, as has been said, effected a revolution in the old system of conveyancing. They did this, not merely by provisions affecting the form of deeds by which purchases, leases, and mortgages of lands are carried through, but by provisions affecting the relations between the parties at every stage throughout the transaction. It seems best then in explaining these Acts to take each such stage in its natural order, and point out as shortly as possible how the law or practice relating to it has been altered by one or other of them.

TITLE.—When a contract for the sale of land is entered into, the first step is for the purchaser to enquire into or *investigate*, as it is called, the vendor's title. This is done by the vendor placing before the purchaser an abstract of his title and evidence to prove such title.

Now the three questions that arise in investigating title are: (1) What title the vendor shall show in his abstract; (2) How such title shall be proved; and (3) Who is to pay the costs of investigation. On all these the contract of sale may make what provision the parties please, and where such provision is made the parties are, of course, bound by it (*g*). Frequently, however, the contract makes no provision at all. It is then said to be "open" as regards these points. And in an open contract the Acts in discussion regulate the rights of the different parties to the conveyance.

1. As to the title the vendor must show in his abstract.

(*g*) *In re National Provincial Bank of England*, [1895] 1 Ch. 190.

An *abstract of title* is a narrative in writing stating in summary the different instruments and facts by force of which the land became vested in the vendor. It commences with some instrument disposing of the land, which instrument is called the *root of title.*

Now the Vendor and Purchaser Act, 1874, provides in effect that on the sale of any estate in land of any tenure (see Interpretation Act, 1889), the root of title shall be an instrument, vesting the estate in the vendor or his predecessor in title, executed not less than forty years before the sale. This general principle is subject, however, to the following qualifications :—

(a) Under a contract for the grant of a lease or sub-lease, or the assignment of an existing lease or sub-lease, the grantee or assignee is not entitled to call for the title to either the freehold or the leasehold in reversion on the lease or sub-lease granted or assigned (V. and P. Act, 1874, s. 2; Con. Act, 1881, s. 3 (1); s. 13).

(b) Under a contract to sell freehold land which once was land of copyhold or customary tenure but has been enfranchised, the purchaser is not entitled to call for the title to make the enfranchisement (Con. Act, 1881, s. 3 (2)).

No instrument dealing with the land executed before the root of title need be produced or abstracted by the vendor, nor can the purchaser require any information or make any requisition or objection (*h*) concerning any such instrument, even although such instrument is recited, covenanted to be produced, or noticed in the instruments abstracted. This rule applies even when the prior instrument created a power which is exercised by one of the abstracted instruments (Con. Act, 1881, s. 3 (3)). And when an abstracted instrument is an instrument carrying into effect a previous written agreement, this previous agreement forms no part of the instrument, and need not be abstracted or produced (Con. Act, 1882, s. 4; S. L. Act, 1882, s. 31 (4)).

(*h*) *Re Cox & Neve*, [1891] 2 Ch. 109.

2. As to evidence to prove the title set out in the abstract.

The abstract is of course merely the vendor's description of his title. He must prove the different instruments abstracted and facts stated in the abstract. The instruments are usually proved by producing the originals; the facts by certificates of births and deaths and statutory declarations.

The Acts under discussion have, however, in order to facilitate proof of title, introduced certain presumptions which on certain evidence being produced are to be taken as true between the parties, until it is shown that they are not true.

The most sweeping of these is, that all recitals, statements, and descriptions of facts, matters, and parties, contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall raise a presumption of the truth of such facts, matters, and descriptions (V. & P. Act, 1874 s. 2 (1)).

Another presumption nearly of the same kind is, that the recital of any instrument prior to the root of title contained in the abstracted instruments is true, and that it gives all the material parts of such instrument, and that such instrument was duly executed (Con. Act, 1881, s. 3 (3)).

Another presumption which arises on the sale of land held by lease or underlease is, that the lease or, in the case of an underlease, it and all superior leases, were duly granted, and that, on the production of the receipt for the last rent (not being a mere peppercorn rent (*i*)) due under the lease or the underlease before the date of actual completion of the purchase, all the covenants and provisions of the lease, or in the case of an underlease of it and all superior leases, have been duly performed and observed up to the date of actual completion (*k*), and in the case of an underlease all the rents due on the superior

(*i*) *In re Moody and Yates' Contract*, (1885) 30 Ch. D. 344.

(*k*) *Howell* v. *Kightley*, (1855) 21 Beav. 331; *Re Highett and Bird's Contract* [1902] 2 Ch. 214.

leases have been duly paid up to such date (Con. Act, 1881, s. 3 (4) (5)).

A decision of the Court (*l*) has given the rule as to recitals in deeds twenty years old a peculiar effect in shortening the length of title required by sect. 1 of the Vendor and Purchaser Act, 1874. Conveyances frequently contain a recital that the vendor is seised in unincumbered fee simple of the land to be conveyed: this is what is called a *recital of seisin*. Now, by this decision it has been held that when such a recital occurs in a document of title over twenty years old produced by the vendor, as such recital must be presumed to be true, the document is sufficient to show that at that time there was a good title in the vendor or his predecessors in title, and accordingly that the vendor need not abstract any documents prior to it. This practically reduces under these circumstances the period limited by sect. 1, from forty to twenty years.

3. Who is to pay the costs of the investigation of title?

The general rule is, that the vendor must at his own expense prepare and deliver to the purchaser a proper abstract of title (*m*), and also produce all the abstracted deeds in his possession for the purpose of proving such abstract. Two provisions are made by the Conveyancing Act, 1881, in this connection:

(a) Where property held under a common title is sold in lots, the purchaser of two or more lots is not entitled to more than one abstract, save at his own expense (Con. Act, 1881, s. 3 (7)).

(b) The cost of producing or obtaining the production of documents abstracted, but not in the vendor's possession, must be borne by the purchaser, should he require their production (Con. Act, 1881, s. 2 (6)) (*n*).

(*l*) *Bolton* v. *London School Board*, (1878) 7 Ch. D. 766.

(*m*) *In re Stamford, Spalding and Boston Banking Company and Knight's Contract*, [1900] 1 Ch. 287.

(*n*) *In re Stuart and Olivant and Seadon's Contract*, [1896] 2 Ch. 328.

FORM OF CONVEYANCE.—When the title of the vendor has been duly investigated the conveyance is prepared.

Already the various parts of a deed have been set out. We will now repeat them in more detail as they appear in a modern conveyance; pointing out the changes effected by the Conveyancing Acts.

Before the Conveyancing Act, 1881, it was usual to insert in every conveyance the following clauses in the order here given :—

First came the *date* of the conveyance: "This indenture made the day of ." This was, or should have been, the date on which the instrument was executed.

Then followed the *parties* to the conveyance, that is the name and description of the grantor, then of anyone directing or consenting to the grant, and then of the grantee.

Following the parties came the *recital of title*, that is, a short statement of the grantor's title to the land, as disclosed in the abstract.

Next came the *recital of the contract*, which consisted of a short statement of the agreement between the parties, which the conveyance was intended to carry out.

After the recital of contract came the *testatum*: "Now this indenture witnesseth." The purpose of the testatum was to introduce the operative part of the conveyance, that is, the part which carried out the contract between the parties which had been already recited. If there were several operative parts in the conveyance, which there often were when the contract referred to different parcels of land, each operative part was introduced by a new testatum : "Now this indenture further witnesseth."

After the testatum followed the *consideration*—that is, a statement of the price given by the purchaser; and the *receipt*—that is, an acknowledgment by the vendor that he had received the consideration.

Then came the *operative words* and *parcels*. In the operative words, "The vendor doth grant unto the

purchaser all that piece or parcel of land," etc., the word "grant" was almost invariably used, because it was the word used in the Real Property Act, 1845, which made a freehold in possession lie in grant as well as in livery. The parcels consisted of a description of the premises which were to be conveyed. Technical words of description were often used in them, but they were not necessary. Any words which identified the premises were sufficient.

Then came what were called the *general words*. These consisted of a long string of phrases, introduced by "together with," describing things which might be connected or enjoyed with the premises—such as rights of way, rights of light, etc.; but the words were inserted whether they were so connected or not. At first probably these were inserted for caution, but later conveyancers possibly retained them for profit, as, before the Conveyancing Act, 1881, conveyances were paid for by what is called in the press "lineage."

After the general words came the *exceptions* and *reservations*. By an exception is meant some interest in or right over the land which is excepted from the grant. Thus, if land is granted without the minerals in it, that is an exception. A reservation means some new right created by the conveyance for the benefit of the vendor. The commonest reservation is a rent.

When the estate conveyed was a fee simple, the next clause was what was called *all the estate* clause. It simply was a wordy statement to the effect that the conveyance carried all the vendor's interest in the land.

After this came the *habendum*. The habendum set out the use to which the land was conveyed, and the extent of it: "To hold the same unto and to the use of the purchaser and his heirs." For present purposes, the point to be noted about it is, that where the purchaser was an individual, the only words which could transfer to him a fee simple were the words "and his heirs," and the only words which could transfer a fee tail were "and the

heirs of his body." If these words were not added to the name of the purchaser the conveyance transferred to him only an estate for life. They were the apt words for creating estates of inheritance, and no other words could be substituted for them (*o*).

After the *habendum* came the vendor's *covenants for title*. There were certain covenants for title which were almost invariably inserted in conveyances, and for this reason they were called "usual" covenants. On an open contract the purchaser was entitled to have these usual covenants inserted, the Court assuming that, where the parties did not stipulate for specific covenants, they contracted on the assumption that the conveyance would in that respect be in the usual form.

The usual covenants on a conveyance of freeholds were four in number. The first was for the vendor's *right to convey*, that is, that he was entitled to convey the premises in question to the purchaser. The second was for *quiet enjoyment*, that is, that the purchaser's possession would not be interfered with by any act on his part or by any lawful act on the part of any one claiming through or under him. The third was for *freedom from incumbrances*, that is, that the premises were not subject to any claims or incumbrances save those subject to which the conveyance was expressly made. The fourth was for *further assurance*, that is, that the vendor, and those claiming or having under him any interest in the premises conveyed, would execute any further assurance which might prove necessary to perfect the conveyance. In the case of a conveyance of leaseholds, there was a further usual covenant, that is, one for the *validity of the lease* assigned to the purchaser.

All these covenants were *qualified*, that is, they made the vendor not absolutely liable, but liable only for breaches of them which occurred since the last purchase for value

(*o*) Litt. s. 1.

of the premises conveyed. That was commonly expressed by saying, that the vendor covenanted against the acts and omissions of himself, his ancestors and testators, and any one lawfully claiming through him or them.

Where the vendor retained the title deeds of the premises conveyed, as he did when the premises conveyed were only part of the land held by the vendor to which such title deeds related, it was usual also for two other express covenants to be inserted. The first was a covenant that the vendor should *safely preserve* the title deeds retained, and the second was that he should at all reasonable times *produce* them to the purchaser.

Finally came the *testimonium*—"In witness," etc.—and the signing and sealing and witnessing clause.

After the vendor had received the full purchase money, and not till then, a further receipt for it was endorsed on the back of the conveyance. Accordingly, the absence of this *endorsed receipt* was considered as giving constructive notice to any person subsequently dealing with the land that the land was subject to the vendor's lien for unpaid purchase money.

Let us now consider how the Conveyancing Acts have altered the form of a conveyance as outlined above.

The chief object of those Acts was to shorten and simplify conveyances. This they sought to effect by four different means. In the first place, they removed certain technicalities. In the second place, from the use of certain words in a conveyance they implied certain clauses. In the third place, they abolished the necessity, or supposed necessity, for certain clauses. And lastly, they clothed certain clauses with statutory meanings.

1. Removing technicalities.

Two alterations have been made in this respect, neither of them of much importance.

The first of these affects the "operative words." It is declared that the use of the word "grant" is not

necessary to convey tenements or hereditaments, corporeal or incorporeal (*p*). It never was.

The second affects the "words of inheritance." It is enacted that, in a deed, in the limitation of an estate of fee simple, the words "in fee simple," without the word "heirs," of an estate in fee tail, the words "in tail" without the words "heirs of the body," and of an estate in tail male or tail female the words "in tail male," or "in tail female," as the case requires, without the words "heirs male of the body" or "heirs female of the body," will be sufficient (*q*). The expressions here substituted for the old words of inheritance are just as technical as the latter, and as liable to defeat the intentions of the grantor. Thus it has been held that a conveyance of land "in fee" without the word "simple," will not pass an estate of inheritance (*r*).

2. Implying clauses from the use of certain words.

The Conveyancing Acts have by this means relieved conveyances of the covenants for title which formerly had to be expressly set out.

By sect. 7 of the Conveyancing Act, 1881, the covenants for title to be implied in any conveyance depend on the character in which the grantor is expressed to convey. If he is expressed to convey as *beneficial owner*, then, if the land conveyed be freehold, the four usual covenants (sect. 7 A); if it be leasehold, the five usual covenants above mentioned (sect. 7 B) are thereby to be implied. And all such covenants will be, as the old express covenants were, qualified. On the other hand, if he is expressed to convey as "settlor," there is implied only a covenant for further assurance (sect. 7 E) and if he is expressed to convey as *trustee* or *mortgagee*, or *as personal representative* of a deceased person, or as *committee* of a lunatic so found, or under an order of the Court, only one covenant is implied, viz., a covenant

(*p*) Con. Act, 1881, s. 49.
(*q*) *Ibid.* s. 51.
(*r*) *Re Ethell and Mitchell's and Butler's Contract*, [1901] 1 Ch. 945.

against incumbrances of the grantor's own contracting (sect. 7 F).

Where the conveyance is by way of mortgage, and the mortgagor is expressed to convey as beneficial owner, the same covenants are implied as in an ordinary conveyance where the grantor conveys as beneficial owner, with, when the land mortgaged is leasehold, a further covenant to pay the rent reserved, and perform the covenants contained in the lease during the continuance of the security. These covenants, however, are not qualified but absolute covenants (s. 7 (C.) and (D)). This was, before the Act, the usual form of such covenants in mortgages.

Some other points with respect to these implied covenants should be remembered. In the first place, where the conveyance is expressed to be by direction of a person "as beneficial owner," the covenants implied from the use of these words apply to the person giving the direction (sect. 7 (2)). In the second place, a conveyance within the section includes an assignment of an existing lease, but not the grant of a new lease (sect. 7 (5)). In the third place, the benefit of the covenants runs with the land (sect. 7 (6)). In the fourth place, the implied covenants may be varied expressly by the terms of the conveyance (sect. 7 (7)). Lastly, where the grantor is not expressed to convey as beneficial owner, trustee, mortgagee, or in any of the other representative capacities above-mentioned, no covenants are implied by the Act (sect. 7 (4)).

3. Abolishing necessity for certain clauses.

The Acts made three changes in this respect.

The first of these changes was with regard to "general words" (*supra*, p. 435). By sect. 6 of the Conveyancing Act, 1881, where no contrary intention is expressed in the conveyance, a conveyance of land, or of land with houses on it, or of a manor, is to operate to convey all the easements and appurtenances hitherto enumerated in the general words, which were at the time of the

conveyance, "demised, occupied, or enjoyed with, or "reputed, or known as part or parcel of, or appurtenant "to the" hereditaments conveyed. The conveyance is to operate to convey these, of course, only so far as the grantor was entitled to convey them (s. 7 (5)).

The words "enjoyed with" have given the courts some trouble. It frequently happens that an owner of a building estate contracts to sell part of it to a builder, but the conveyance is not to be executed until the houses to be built upon it have been erected. Upon conveyance after the houses are erected the question sometimes arises, what easements are "enjoyed with" the erected houses over the remaining part of the building estate? It seems now to be settled that the section has not altered the law, and that what easements are conveyed depends on the intention of the parties, as shewn by circumstances surrounding the transaction (*s*), or as indicated by the terms of the conveyance (*t*).

The second of these changes was with regard to "all the estate" clause (*supra*, p. 435). By sect. 63 of the Conveyancing Act, 1881, unless a contrary intention appears, every conveyance of property shall be effectual to pass all the estate or interest in it, which the parties intended or had power to convey.

The third of these changes was with regard to the two receipt clauses—the one in the body of the conveyance (*supra*, p. 434), and the one endorsed on the back of it (*supra*, p. 437). By sect. 54, the former of these is made a sufficient discharge for the consideration to the person paying the same. And by sect. 55, the same receipt is in favour of a subsequent purchaser without notice to be sufficient evidence of the payment of the purchase money.

All of these three changes apply only to conveyances executed after the commencement of the Conveyancing Act, 1881, that is 31st December, 1881 (s. 1 (2)).

(*s*) *Godwin* v. *Schweppes, Limited*, [1902] 1 Ch. 926.

(*t*) *Baily* v. *Icke*, (1891) 64 L. T. 789.

4. Statutory meanings of certain clauses.

The changes made in this way by the Conveyancing Acts affect chiefly the covenants for production and safe custody of title deeds retained by the vendor.

By sect. 9 of the Conveyancing Act, 1881, for the old covenants may now be substituted two short clauses called an acknowledgment and undertaking, and the effect of such acknowledgment and undertaking is defined. Such effect is much the same as that of the old covenants.

Taking all these sections of the Conveyancing Act, 1881, and also sect. 2 of the Vendor and Purchaser Act, 1874, as construed in *Bolton* v. *London School Board* (7 Ch. D. 766; see *supra*, p. 433), we can now estimate the effect of recent legislation on the form of an ordinary conveyance. Taking the clauses of such as set out above (*supra*, p. 434), the *date* and *parties* are as before. The *recital of title*, however, where the conveyance is of land held in fee simple, now usually consists merely of a recital of the vendor's seisin. The *recital of contract, testatum, consideration, and receipt*, are in form unaltered. The only changes in the *operative words* are that the word "convey" is now very generally used, while previously the most common word was "grant," and the capacity in which the vendor conveys, "as beneficial owner," etc., is set out. The *parcels* are the same, but the *general words* are altogether omitted. The *exceptions* and *reservations* are the same, but *all the estate* clause is omitted. As to the *habendum*, the only change is that for "and heirs" or "and heirs of the body," the words "in fee simple" and "in tail" may be substituted. *Covenants for title*, however, are altogether omitted, while for the long *covenants for safe custody* and *production* are substituted the short statutory *acknowledgment and undertaking*. The *testimonium* is as before; but the *endorsed receipt* is now useless, and therefore has disappeared.

Powers Conferred on Parties.—Another mode in

which the Acts sought to simplify conveyances was, not by implying certain clauses in the conveyance, but by giving to the parties to the conveyance certain rights and powers which previously they had not possessed, unless the conveyance expressly conferred them.

Powers and rights so conferred are of two kinds. In the first place, some are conferred on certain parties to the conveyance, whether the grantor wished them to have them or not. Incomparably the most important powers and rights of this kind arise under the Settled Land Acts, which we are to consider separately. In the second place, some are conferred on certain parties, unless the conveyance expressly excludes them. These are very analogous to the implied clauses we have been considering, and, like such implied clauses, they were designed by the legislature almost entirely for the purpose of conferring on the parties powers and rights, which in well-drawn instruments, were previously conferred expressly upon them.

These conferred powers and rights have little to do with ordinary conveyances on sale. They are given chiefly in connection with the creation of mortgages, rent charges and trusts for infants.

1. *Mortgages.*—The first new right conferred in connection with mortgages is the right which the mortgagor, or an incumbrancer, now has, on paying the money secured on the mortgage, to require the mortgagee to convey the mortgage debt and the mortgaged premises to a third person, instead of reconveying them to the mortgagor himself (Conveyancing Act, 1881, s. 15; Conveyancing Act, 1882, s. 12).

A second new right, closely related to the preceding, is the right of a mortgagor, so long as his equity of redemption subsists, to require the mortgagee at all reasonable times, and at the mortgagor's cost, to permit the mortgagor to inspect the title deeds of the mortgaged premises in the custody of the mortgagee (Conveyancing

Act, 1881, s. 16). This right, which cannot be excluded by any words in the mortgage deed, is given only as respects mortgages executed after 1881. Its object is, to facilitate the sale of the mortgaged premises and the transfer of the mortgage debt, by enabling the mortgagor to prove his title.

The most important, however, of the new rights and powers connected with mortgages created by the Conveyancing Acts, are the powers of leasing conferred on the mortgagor or mortgagee in possession, and the powers of sale, etc. (*u*), made incident to the mortgagee's estate.

By sect. 18 of the Conveyancing Act, 1881, a mortgagor of land in possession has, as against every incumbrancer, and a mortgagee of land in possession has as against every prior incumbrancer, and as against the mortgagor, power to make an agricultural or occupation (*x*) lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years, of the mortgaged land. Such leases must be made to take effect in possession not later than twelve months after their date, and the best rent reasonably obtainable must be reserved upon them, though, in the case of a building or repairing lease, the rent reserved during the first five years may be nominal.

By sect. 19 of the same Act, where the mortgage is by deed, the mortgagee has, as incident to his estate, the following powers :

1. A power, when the mortgage money has become due, to sell the mortgaged property or any part of it (*y*).

2. A power, at any time after the date of the mortgage, to insure and keep insured against loss by fire anything of an insurable nature forming part of the mortgaged property.

(*u*) Implied powers of sale, etc., were first given by Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145).

(*x*) *Brown* v. *Peto*, [1900] 2 Q. B. 653.

(*y*) See *Born* v. *Turner*, [1900] 2 Ch. 211.

3. A power, when the mortgage money has become due, to appoint a receiver.

4. A power, while the mortgagee is in possession, to cut and sell timber not planted for shelter or ornament.

These powers arise only in mortgages executed after 1881, and may be modified (*z*) or excluded by the mortgage deed.

As regards the power of sale, by sect. 20, it is to arise only after notice to pay the mortgage debt, and failure for three months to pay it; or, after interest has been in arrear for two months; or, after there has been a breach of a provision in the mortgage deed, other than the covenant to pay the debt.

The money arising from the sale, and from the insurance and sale of timber, must be applied in the mode customary heretofore, that is, in discharge of prior incumbrances, in payment of costs and expenses, and in satisfaction of principal, interest, and other money due under the mortgage, the balance, if any, being paid to the subsequent mortgagees, or to the mortgagor. But a mortgagee may require money received on an insurance to be expended in restoring the premises (sects. 21 and 23.)

2. *Rentcharges.*—Formerly, when a rent or any other annual payment was charged upon land, it was customary to secure its payment, in the case of settlements, at any rate, by the creation of a term of years to be held in trust to raise it. Now, sect. 44 of the Conveyancing Act, 1881, renders this no longer necessary. By that section, the person entitled to an annual sum charged on land, or payable out of the income of land, whether strictly speaking a rentcharge or not, is entitled, unless a contrary intention appears in the instrument creating the charge, (1), if the annual sum, or part of it, is unpaid for twenty-one days after the time appointed for payment, to

(*z*) See *Berry* v. *Halifax Commercial Banking Co.*, [1901] 1 Ch. 188.

distrain; (2) if it is unpaid for forty days, to take possession of and hold the land, and take the income until the arrears are paid, and while in possession he is not impeachable for waste; or (3), if it is unpaid for a like period he can, by deed, demise the land to a trustee, who may by mortgage, sale, or demise, or other reasonable means, raise and pay the annual sum and all arrears and costs.

3. *Trusts for Infants.*—It was usual, in deeds creating trusts for the benefits of infants, to give the trustees of the will or settlement large powers during the infancy of the beneficiaries for the management of the lands, and for the maintenance of the infant entitled to them. The Conveyancing Act, 1881, now gives the following powers:—

In the first place, it is enacted by sect. 41, that, when a person seised of or entitled to land for an estate in fee simple or for any leasehold interest at a rent is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

This enactment is now of little practical importance, since, as we shall see, it is superseded by sects. 59 and 60 of the Settled Land Act, 1882.

In the second place, as regards instruments coming into operation after 1881, where there is nothing in them to the contrary, it makes the following provisions for the management of infants' estates and maintenance of infants:

By sect. 42, if and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman also unmarried, the trustees (if any) appointed for this purpose by the settlement (*a*), and (failing them) the persons if any who are for the time being under the settlement trustees with power of sale of the settled land or any part thereof, or

(*a*) *In re Helyar, Helyar* v. *Beckett*, [1902] 1 Ch. 391.

with power of consent to or approval of the exercise of such power of sale, and (failing them) any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant (*b*), may enter into and continue in possession of the land, and may exercise the following powers (*c*), that is to say:—(1) To manage or superintend the management of the land,—with power to fell timber or cut underwood in the usual course; and with power to rebuild (and to repair) houses and other buildings, and to continue the working of mines, and to drain or otherwise improve the land, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies and to accept surrenders and the like,—the trustees being (in their management) subject to (but subject only to) the same restrictions as the infant, if of full age, would be subject to (*d*); (2) Out of the income of the land, including the produce of the sale of timber and underwood, to pay the expenses incurred in the management, and all outgoings not properly payable by any other person, and the interest on mortgage debts (*e*); and (3) To apply at discretion any income for the infant's maintenance, education or benefit, or pay thereout any money to the infant's parent or guardian to be applied for the same purposes (*f*); and thereafter (4) To invest the residue of the income, accumulating the income of the investments in the way of compound interest; and (5) To stand possessed of the accumulated fund (without prejudice to their right to apply such fund as if the same were income of the current year) (*g*), on the trusts following (namely): First, if the infant attains the age of twenty-one years, then in trust for the infant; or if the infant being a female marries while an infant, then in

(*b*) *In re Cowley*, [1901] 1 Ch. 38.

(*c*) *Welch* v. *Channell*, (1884) 26 Ch. D. 58, at p. 63.

(*d*) 44 & 45 Vict. c. 41, s. 42, sub-s. (2).

(*e*) Sect. 42, sub-s. (3).

(*f*) *Ibid.* sub-s. (4).

(*g*) *Ibid.* sub-s. (5).

trust for the infant for her separate use; but, secondly, if the infant dies while an infant and, being a female, without having been married, then (subject to any settlement affecting the fund or the land from which the income has arisen) in trust for the infant's personal representatives as part of the infant's personal estate.

By sect. 43, where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age (*h*), the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not; and the trustees are to accumulate the residue at compound interest, and to hold these accumulations (without prejudice to their right to apply them as income of the current year), for the benefit of the person who ultimately becomes entitled to the property from which the same arise.

Completion of Conveyance.—When the conveyance has been duly drafted, the next step is its completion by due execution. With regard to this the Acts we are considering contain also certain provisions.

In the first place, then, the vendor entitled legally and beneficially must convey, and, in case he is dead, his personal representatives must do so. When the personal representatives convey, this is not to affect the beneficial right of any person in respect of the land (Con. Act, 1881, s. 4).

Where the legal estate is outstanding in a trustee or

(*h*) *In re Jeffery*, [1891] 1 Ch. 671; *In re Burton's Will*, [1892] 2 Ch. 38; *In re Holford*, [1894] 3 Ch. 30; *In re Averill*, [1898] 1 Ch. 523.

mortgagee, he must join to convey it, and in case he is dead his personal representatives, and not his heir, must convey it if the land be leasehold or freehold (Con. Act, 1881, s. 30), but not if it be copyhold (Copyhold Act, 1894, s. 88). Where a married woman is a "bare trustee" (*i.e.*, a trustee with no active duties to perform), she may convey as a feme sole (Trustee Act, 1893, s. 16). Where there is an incumbrance on the land, and the incumbrancer will not or cannot join in the conveyance, the court may by order discharge the land from the incumbrance, on the substitution of some other adequate security for it (Con. Act, 1881, s. 5). And in the same way, when the land is subject to a quit rent, rentcharge, or other perpetual annual sum, not being rent reserved in lieu of any purchase money, it may be discharged therefrom under certificate of the Board of Agriculture (Copyhold Department), specifying the redemption value thereof, and upon payment or tender of that value, and upon a further certificate of the Board to the effect that the rent in question is redeemed (Con. Act, 1881, s. 45).

In the next place, as to the mode of executing the conveyance, the purchaser is not entitled to have it executed in his own presence, but he can insist that its execution shall be attested by a person who may be his solicitor (Con. Act, 1881, s. 8). Where the solicitor of the vendor, whether the vendor be beneficial owner (Con. Act, 1881, s. 56) or a trustee (Trustee Act, 1893, s. 17), produces the purchase deed duly executed by the vendor, and such deed contains a receipt for the purchase money, either in the body of the deed or endorsed on it, that will be sufficient authority to justify the purchaser in paying the purchase money to the solicitor.

In the next place, where the sale is made under an order of the High Court, the order constitutes a protection to the purchaser purchasing in faith of it (Con. Act, 1881, s. 70) (*hh*); and if the purchaser obtains a certificate

(*hh*) *Jones* v. *Barnett*, [1900] 1 Ch. 370.

from the Central Office (now the Land Registry Office) of an official search for judgments, deeds, etc., which are required by law to be registered or enrolled, this will be in his favour conclusive against any judgments, deeds, etc., not appearing in such certificate (Con. Act, 1882, s. 2).

CHANGES IN THE GENERAL LAW.—We have now dealt with the changes effected by the Acts now under consideration in the practice of conveyancing. There are several other points which, though all more or less affecting the practice of conveyancing, are rather to be considered primarily as amendments of the general law.

1. *Conveyance to grantor jointly with another, or by husband to wife, or wife to husband.*

The nearest of these points to a direct change in the form of a conveyance is the provision of sect. 50 of the Conveyancing Act, 1881, that henceforth a grantor may, by ordinary conveyance, convey freehold land to himself jointly with another, and that a husband may in the same way convey to his wife and she to him.

At common law a man could not convey to himself; nor (they being regarded in law as one person) a husband to his wife, nor a wife to her husband. Accordingly, where such conveyances were necessary, they were made by way of use. Now they can be made by ordinary conveyance; except that, when a man wishes to convey to *himself alone*, he must still convey by way of use.

2. *Leases.* The Acts under consideration contain several important provisions more or less new with regard to leases.

The first of these refers to covenants and conditions. By sect. 10 of the Conveyancing Act, 1881, it is provided, in favour of the lessor (*i*), that the rent reserved by the lease, and the benefit of every covenant or provision on the lessee's part therein contained, having reference to

(*i*) *Baynton* v. *Morgan*, (1888) 22 Q. B. D, 74.

the subject-matter thereof, and of the condition of re-entry therein contained, shall be annexed to and go with the reversion immediately expectant on the lease,—and this notwithstanding the severance of that reversion. By sect. 11, it is provided, in favour of the lessee (*k*), that the obligation of every covenant on the lessor's part contained in the lease, having reference to the subject-matter of the lease, shall, if and as far as the lessor has power to bind the reversion immediately expectant on the lease, be annexed to and go with that reversion, and this notwithstanding the severance of that reversion. Sect. 12 enacts, as regards conditions of re-entry (and other conditions), that, when either the reversion upon the lease is severed, or the lease itself as to part of the hereditaments thereby demised is determined, notwithstanding such severance of the reversion or such cesser of the term as to part of the land, every condition of re-entry or other condition shall be apportioned, and remain annexed to the several parts of the reversion, and be in force, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, had alone originally been comprised in the lease.

The chief alteration in the law made by these enactments is with regard to rights of re-entry for conditions broken. Previously the only rights of re-entry which survived the severance of the reversion on a lease were rights of re-entry for non-payment of rent, which were protected by the Law of Property Amendment Act, 1859 (*l*). Sect. 12 (*supra*) (and apparently sect. 10 also) extends this protection to the right of re-entry for any condition broken.

The next provision with regard to leases refers to relief from forfeiture for condition broken. This is dealt with by sect. 14 of the Conveyancing Act, 1881, as amended by sects. 2, 4, and 5 of the Conveyancing Act, 1892 (*m*). Just

(*k*) *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522.

(*l*) 22 & 23 Vict. c. 35, s 3.

(*m*) 55 & 56 Vict. c. 13.

as the objects of sects. 10, 11, and 12 were, to preserve covenants and rights of re-entry for breach, so the object of these enactments was to relieve the tenant from their effect, and, just as the earlier sections extended a protection, which was previously given only to conditions of re-entry for non-payment of rent, to all conditions of re-entry; so the enactments we are now dealing with extended the relief previously given only on breaches of condition of re-entry for non-payment of rent (Common Law Procedure Act, 1852 (*n*)), to breaches of all conditions of re-entry save an excepted few.

The joint effect of sect. 14 of the Conveyancing Act, 1881, and sects. 2, 4, and 5 of the Conveyancing Act, 1892, may be summed up thus. The right of re-entry for breach of a condition in a lease (which for this purpose includes an underlease, and also agreements for leases or underleases which are specifically enforceable by the intended lessees (Con. Act, 1882, s. 5) and also fee farm grants), is not to be enforceable by action or otherwise (*o*), unless and until the lessor serves on the lessee a notice specifying (with considerable exactness) (*p*) the particular breach complained of, and requiring the lessee to remedy the breach (if and so far as remediable), and in any case requiring him to make compensation in money for the breach. The lessee is to have a reasonable time thereafter to remedy the breach, and in any case to make compensation to the lessor for the breach. Subject to that notice being first given, however, the lessor is entitled to enforce the forfeiture by ejectment in the usual way, receiving, in general, the rent which shall have accrued due during the currency of the notice (*q*). But where a lessor is proceeding by action or otherwise to enforce the forfeiture, the lessee may in the lessor's action,—

(*n*) 15 & 16 Vict. c. 76, ss. 210, 212.

(*o*) *Re Riggs; Ex parte Lovell*, [1901] 2 K. B. 16.

(*p*) *Fleicher* v. *Nokes*, [1897] 1 Ch. 271; *Gregory* v. *Serle*, [1898] 1 Ch. 652.

(*q*) *Penton* v. *Barnett*, [1898] 1 Q. B. 276.

or, if the lessor shall not yet have actually entered for the forfeiture (*r*), the lessee may in any action brought by himself,—apply to the court for relief; and the court may in its discretion grant or refuse the relief, on such terms as to costs, expenses, damages, compensation, penalty, or otherwise, as the circumstances of the case may require, the lessee paying in all cases the lessor's expenses, including his valuer or surveyor's charges (Con. Act, 1892, s. 2). These provisions for the relief of lessees against the forfeiture of their own leases have been (in substance) made applicable also to their relief against the loss of their leases through or consequent upon the forfeiture of the superior lease, if any (Con. Act, 1892, s. 4). An exception to this power to grant relief is made as to covenants against assigning (*s*) and sub-letting, and as to covenants for the inspection of mines or the books or weighing machines of mines (Con. Act, 1881, s. 14). At first, conditions of re-entry on the leasehold being taken in execution or the lessee becoming bankrupt were also excepted from the Court's power to relieve; but now this is not so until the year after the execution or bankruptcy, and then only if the lessee's interest is not disposed of (Con. Act, 1892, s. 2). This provision, however, does not extend to forfeitures in the case of leases of agricultural land, furnished and licensed houses, mines, or other property, where the personal qualification of the tenant is important (Con. Act, 1892, s. 2).

A third provision is made with regard to leases by sect. 3 of the Conveyancing Act, 1892, which prohibits lessors, where leases require the lessor's consent to an assignment, exacting fines for giving such consent.

3. *Enlargement of long terms:*

Formerly long terms—that is, terms for a thousand

(*r*) *Roger Cholmeley's School* v. *Sewell*, [1893] 2 Q. B. 254; *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

(*s*) *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417.

years or so at a nominal or at no rent—were commonly created for several purposes. They were created by way of mortgage of fee simples, in order that, on the death of the mortgagee, the mortgaged land, and the right to receive the mortgage money might both—as they now do under sect. 30 of the Conveyancing Act, 1881—vest in the mortgagee's executors or administrators. They were also created by way of settlement for the purpose of securing the payment of annual sums—such as pin money and jointures—charged on the settled land. Owing to sect. 44 of the same Act that is no longer necessary either, but that section refers only to annual sums; and so, when a lump sum is charged, as for portions, it is still necessary to create a long term, to enable the trustees of the settlement to raise it conveniently.

It was also at one time customary when the money which these terms were created to secure was duly paid, not to surrender them to the freeholder, and so let them merge and determine in the freehold. The practice rather was to keep them alive, in order, on the sale of the freehold, to assign them to trustees in trust *to attend the inheritance*. The object of this proceeding was, to give to the purchaser of the freehold a protection against any incumbrances on the freehold, created after the term and before the purchase, of which he had no notice at the time he purchased. If such incumbrances were discovered after the purchase, the purchaser could rely on his term, which took precedence of them, and which the trustees held in trust for him.

Like some other expedients for safeguarding title, terms attending the inheritance, from being a protection, became an expense to the purchaser and a danger to other persons. Accordingly, the legislature resolved to abolish them. This was accomplished by the Satisfied Terms Act, 1845 (*t*), which enacted that such long terms as should (either by express declaration or by construction of law)

(*t*) 8 & 9 Vict. c. 112.

be, on the 31st December, 1845, attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine, as to the land upon the inheritance or reversion whereof they should be so attendant, subject only to this, that every such term of years made so attendant by *express declaration* (although by the Act made to cease and determine), should afford to every person the same protection as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after the 31st of December, 1845, and should, for the purpose of such protection, be considered both at law and in equity to be a subsisting term; and further, that such terms as should become satisfied (*u*) after the 31st December, 1845, and should, either by express declaration or by construction of law, become attendant upon the inheritance or reversion of any lands, should, immediately on the same becoming so attendant, absolutely cease and determine, as to the land upon the inheritance or reversion whereof such terms should become so attendant.

Many long terms, of course, were never satisfied. In the case of those arising under settlements, the trustees may have had to sell them to raise the portions. In the case of those created for mortgage purposes, the mortgagee, having failed to secure repayments, may have foreclosed. And under sect. 44 of the Conveyancing Act, 1881, many may be created now by the statutory power given to secure annual sums charged on land. Now, when a long term ceases to be a mere security, and becomes an absolute term for a thousand years not subject to any rent, it is for all practical purposes the fee simple in the land; and the Conveyancing Acts of 1881 and 1882 recognise this fact, by enabling its owner to turn it into a fee simple, provided it satisfies certain conditions.

These are (1) that the term was originally for not less than 300 years, of which 200 are unexpired; (2) that it

(*u*) *Anderson* v. *Pignet*, (1872) L. R. 8 Ch. App. 180.

is subject to no trust or equity of redemption or right of re-entry for condition broken in favour of the freeholder or other reversioner; (3) that it is either not subject to any rent, or subject merely to a peppercorn rent or other rent of no money value; and (4) that, if a sub-lease, the superior lease also satisfies these conditions (*x*). If the term satisfies these conditions, it may be enlarged into a fee simple by a mere declaration by deed by the person beneficially entitled, or entitled as trustee or personal representative of a deceased person. Such fee simple is subject to the trusts and limitations which affected the term; and it entitles the owner of it to the mines and minerals, unless these have already become separate in ownership from the soil.

Part II.—The Settled Land Acts.

Introductory.—As has already been said, the Settled Land Acts, 1882 to 1890 (*y*), were passed for the purpose of promoting "free trade" in land. Though, as we have seen, the rule of limitation permitted land to be tied up only for a life or lives in being and twenty-one years at the utmost, yet, by the system of resettlement which became customary, no sooner had living persons become capable of alienating the fee than a new settlement was made, which left no greater interest in any living person than a life estate. Thus, A. on his marriage would settle his property on himself for life, then, subject to a jointure to his wife if she survived him, upon his eldest and other

(*x*) Con. Act, 1881, s. 65; Con. Act, 1882, s. 11.

(*y*) 45 & 46 Vict. c. 38, amended by the Settled Land Act, 1884 (47 & 48 Vict. c. 18); the Settled Land Act, 1887 (50 & 51 Vict. c. 30); the Settled Land Act, 1889 (52 & 53 Vict. c. 36); sect. 2 of the 52 & 53 Vict. c. 30 (Board of Agriculture Act, 1889); sect. 74, sub-s. (1), of the 53 & 54 Vict. c. 70 (Housing of Working Classes Act, 1890); and the Settled Land Act, 1890 (53 & 54 Vict. c. 69), which last-mentioned Act (sect. 17, as to the appointment and retirement of trustees) has in its turn also been amended by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

sons in tail, in order of seniority, with remainders over. Now, until A. had a son who attained twenty-one, the fee was inalienable, since A. had only a life estate, and till his son attained twenty-one he was a minor, and as such unable to alienate his fee tail. Even after the son attained that age, A. (if living) was protector of the settlement, and without his consent the son could create nothing but an unmarketable base fee. Meanwhile, the son had no benefit out of the settled land. On the son's coming of age then, or at any rate on his marriage, he and A. entered into an arrangement by which, in consideration of an annuity or some allowance, the son joined A. in docking the entail and resettling the land; A. taking a life estate by way of restoration of his estate, the son taking a life estate in succession to his father's, and the remainder being limited in fee tail upon the son's children, and, in default of children, on his brothers as before.

This custom led to many economic and other mischiefs, by preventing the grant of long leases for building and mining, and the sale out and out of the settled land by owners unwilling or unable to develope it. These mischiefs were in many cases mitigated by means of clauses introduced into the settlement, giving the life tenant large powers to deal with the settled land. But in too many cases the settlor, more anxious to preserve his ancestral acres in his family's hands than to promote the public welfare, refused to have such clauses in the settlement. In consequence, several statutes were passed conferring powers on life tenants under settlements. Of these the only one which need now be mentioned—besides the Acts we are discussing—is the Settled Estates Act, 1877 (*z*).

That Act proceeded on the plan of giving the tenant for life in possession the powers of an almost absolute owner

(*z*) 40 & 41 Vict. c. 18.

over the settled land. He could grant long leases of it, and easements over it, and could sell it. But he held these powers as a trustee for every one interested under the settlement. The money that resulted from the exercise of the statutory powers was not his, but money held upon trust subject to the same limitation as had bound the settled land. The defect of the Act was, that it required the consent or order of the Court to the exercise by the life tenant of his powers, as well as the concurrence of many of the parties interested under the settlement. It is superseded (but not repealed) by the Settled Land Acts, 1882—1890; and its chief practical importance now lies in the fact, that a tenant in dower is a life tenant under it (sect. 46), and entitled to exercise the powers of a life tenant given by it, while she is not a life tenant within the Settled Land Acts.

The Settled Land Acts proceed much on the same lines; but they do not make the exercise of the tenant for life's powers generally subject to the consent of the Court or of the persons interested under the settlement. Save in a few specified cases, he is entitled to exercise them freely, subject only to his giving general notice of his intention to do so to the trustees of the settlement. The trustees have no right to interfere with his exercise of them, unless he is exercising them in an improper manner. It is then their duty to apply to the Court to restrain such exercise. The money resulting from their exercise, called *capital money*, is invested in their names or used for purposes prescribed by the Act. In the first case, the limitations affecting the land are transferred to the investments. In the second, the settled land is benefited to the extent of the value of the capital money. The tenant is a trustee of his statutory powers (*zz*), and is required to exercise them for the benefit of all entitled under the settlement. In this way it is attempted to preserve the system of strict settlement, while at the same

(*zz*) S. L. A. 1882, s. 53.

time giving the same facility for transfer and improvement of the settled lands as would result from forbidding settlements of land altogether.

With these words of explanation as to the object and plans of the Acts, we will now proceed to a consideration of their numerous and elaborate provisions. These seem to fall naturally into two divisions, the first general provisions which relate to all the tenant can do under the Acts, the second particular provisions, which relate to the exercise by him of any particular power given by them.

In referring shortly to the Acts, we will as a rule give merely the section, where it is in the principal Act—that of 1882; where we cite from the amending Acts we will place before the section the letters S. L. A., with the year of the Act cited.

General Provisions.

LAND AND SETTLEMENT.—Land in the Act includes incorporeal hereditaments and an undivided share in land (*a*). (See sect. 2 (10)). A settlement is defined as any deed, will, or other instrument, or number of instruments, whether dated before or after the commencement of the Settled Land Act, 1882 (1st January, 1883), or partly before and partly after such commencement, by which any land or interest in land stands for the time being limited to or in trust for any persons by way of succession (*b*). And a remainder or reversion not disposed of by the settlement, and reverting to the settlor or descending to the settlor's heir, is deemed to be within the settlement (sect. 2 (2)). Settled land is land, and any estate or interest therein, which is the subject of a settlement, regard being had to the state of facts and the limitations at the time of the settlement (sect. 2). And it includes

(*a*) *Cooper* v. *Belsey*, [1899] 1 Ch. 639.

(*b*) *Re Pocock and Prankerd's Contract*, [1896] 1 Ch. 302; *Re Munday and Roper's Contract*, [1899] 1 Ch. 275.

for the purpose of the Act land to which an infant is entitled in fee simple, or for the whole estate (sect. 59).

TENANT FOR LIFE.—Tenant for life is to include, for the purposes of the Acts, not merely the person entitled beneficially for his life (whether subject to any incumbrance or not) (*c*) to the possession or to the receipts of the rents and profits of the land, but also two or more persons entitled as co-tenants for life to such possession or receipt (sect. 2 (6)), and also the following persons (when entitled to such possession or receipt) viz., persons entitled to (1) a fee-simple defeasible, (2) to a base fee, (3) to an estate for years (not being a lease at a rent) determinable with life, (4) to an estate *pur auter vie*, (5) to a defeasible life estate, (6) to an estate by the curtesy, (7) to an estate tail generally (whether the reversion thereon is in the Crown or not), (8) to an estate tail after possibility of issue extinct, (9) and an infant tenant in fee or for the whole estate in the land (sect. 60). But the phrase "tenant for life" is not to include (even when they are in such possession or receipt as aforesaid), (1) a dowress, (2) or a tenant in tail of lands purchased with moneys provided by Parliament in consideration of public services (sect. 58).

Where the tenant for life is an infant, then, during his infancy (if a male), or during her infancy and discoverture (if a female), the trustees of the settlement and, failing any, the nominees of the Court, are to act for him or her (sect. 60). A married woman, (being or being deemed a tenant for life,) exercises her powers as regards her estate, not being separate, in conjunction with her husband, and as regards her separate estate as a *feme sole*, and is not (for any of the purposes of the Act) restrained by even an express restraint on anticipation (sect. 61). A lunatic so found by inquisition (being or being deemed a tenant for life), acts by his or her committee, with the sanction of

(*c*) *Re Jones*, (1884) 26 Ch. D. 736.

the Lord Chancellor or Lords Justices sitting in lunacy (sect. 62) (*d*); but a lunatic not so found cannot so act (save for the purposes of leases), the Lunacy Act, 1890, ss. 116, 120, 128, being inapplicable (save as regards *leases*) (*e*) to any of the purposes of the Settled Land Acts.

TRUSTEES OF THE SETTLEMENT.—For the purposes of the Acts the following persons are trustees of the settlement:—

1. Trustees (if any) under the settlement, with an immediate power of sale or with power to approve or consent to a sale of the settled land (sect. 2 (8)).

2. Failing these, then the persons (if any) who by the settlement are declared to be trustees for the purposes of the Acts (sect. 2 (8)).

3. Failing these, trustees (if any) under the settlement with power of or upon trust for sale, or with power to consent to sale of any other land comprised in the settlement and subject to the same limitations (*f*) (S. L. Act, 1890, s. 16).

4. Failing these, trustees (if any) under the settlement with a future or contingent power of or trust for sale, or power to consent to the sale of the settled land (S. L. Act, 1890, s. 16).

5. Failing these, the Court will appoint proper persons to be trustees for the purposes of the Acts (sect. 38).

CHARACTER OF TENANT'S POWERS. — The following are the chief characteristics of the powers conferred upon the life tenant by the Acts.

1. *Compulsory.* They are in their nature compulsory, that is, the Acts confer them on the tenant, whether the settlor wishes him to have them or not. Anything in the settlement excluding, or purporting to exclude, or tending to exclude, the powers given by the Act to the tenant for

(*d*) *Re Martha Baggs*, [1894] 2 Ch. 416 n.

(*e*) *Re Salt*, [1896] 1 Ch. 117.

(*f*) *Re Garnett Orme and Hargreave's Contract*, (1883) 25 Ch. D. 595.

life, or containing anything designed to induce him to abstain from exercising these powers, is void; so much so, that an estate limited to him by way of conditional limitation until he does exercise or attempt to exercise the powers of the Act, or any of them, is discharged of the condition altogether, and is to be deemed an estate to continue for the longest possible time for which it would continue if no such condition was annexed thereto (sect. 51). Moreover, no forfeiture is to result to the tenant for life from the exercise of these powers or any of them (sect. 52). But the settlor may by the settlement confer larger powers either on the tenant for life or on the trustees; and if he does, then these powers are to be exerciseable as if the Act had conferred such larger powers, with all incidental consequences (sect. 57). And the powers of the Act are not to interfere with other powers, howsoever given, but are to be cumulative; and in case of any conflict, the powers of the Act are to prevail (sect. 56) (*g*). In case of doubt, the Court will give its judicial opinion on summons under the Act (sect. 56).

2. *Personal.* They are personal to the tenant himself. He cannot resign or release them. Even after he has assigned his estate under the settlement, he can continue to exercise them, provided he does not thereby defeat any rights of an assignee for value of his own estate (sect. 50) (*h*). No assignment (unless by way of mortgage to secure a loan) made by him in consideration of marriage, or by way of family arrangement, is to be deemed to constitute the assignee an assignee for value within this exception (S. L. Act, 1890, s. 4) (*i*).

3. *Fiduciary.* They are fiduciary, that is, the tenant for life, in exercising them, must have regard, not merely to his own interests, but to the interests of all entitled

(*g*) *Re Duke of Newcastle's Estates*, (1883) 24 Ch. D. 129.

(*h*) *In re Sebright's Settled Estates*, (1886) 33 Ch. D. 429.

(*i*) *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275; *Re Keck and Hart's Contract*, [1898] 1 Ch. 617.

under the settlement (sect. 53). Thus, if any one induces him to exercise any power given him by the Act by a bribe, such exercise will be void as against those claiming under the settlement (*k*); nevertheless, on any sale, exchange, partition, lease, mortgage or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with the tenant for life, will, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent (as the case may require) that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Act (sect. 54). And in particular, a statement contained in a lease or in an endorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under the Act in relation to the lease, will, in favour of the *bonâ fide* lessee and of those claiming under him, be sufficient evidence of the matter therein stated (sects. 7 (5)). And the remedy (if any) will, therefore, in all such cases be a personal one against the tenant for life himself.

4. *Notice.* A tenant for life, intending to exercise all or any of the powers conferred on him by the Acts, must in general give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters containing the notice addressed to the trustees severally, each at his usual or last-known place of abode in the United Kingdom; and he is, in general, to give the like notice also to the solicitor for the trustees, if any such solicitor be known to the tenant for life, by posting a registered letter containing the notice addressed to the solicitor at his place of business in the United Kingdom. And every letter (containing any such notice as aforesaid) is to be posted not less than one month before the making by the tenant for life of the sale, exchange, partition, or lease,—or of the mortgage or

(*k*) *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

charge incidental thereto,—or of any contract for the same; and the Act expressly provides that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. But any person dealing in good faith with the tenant for life, is not concerned to inquire respecting the giving of any such notice (sect. 54). However, as regards such notices, it has been provided by the Settled Land Act, 1884, s. 5, to obviate the effect of a contrary decision (*l*), that the notice required by section forty-five of the Act of 1882, of the intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf, the tenant for life furnishing to the trustees (on their request) all reasonable information from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended; and further, that any trustee, by writing under his hand, may waive notice, either in any particular case or generally, and may accept less than one month's notice. By the Settled Land Act, 1890 (*m*), it has now been provided, as regards leases not exceeding twenty-one years, and reserving the best rent and without taking any fine, and not exempting the lessee from punishment for waste, that such leases may be made by the tenant for life, without his giving any such notice at all, and although there should be no trustees of the settlement in existence.

5. *Generally.* The powers conferred by the Acts may be exercised from time to time; and everything incidental to their full and effective execution may be done as if originally comprised in the power (sect. 55).

6. *Settlements upon Trust for sale.* Lastly, when the settlement is made by way of an absolute trust for sale, then the person entitled to the income until sale, though deemed the tenant for life of the land so settled (sect. 63),

(*l*) *In re Ray's Settled Estates*, (1884) 25 Ch. D. 464.

(*m*) Sect. 7.

is not entitled to exercise the powers given by the Acts without the leave of the Court (S. L. Act, 1884, s. 7).

POSITION OF TRUSTEES.—1. It is not incumbent on the trustees after or in consequence of receiving notice from the tenant for life of his intention to exercise his powers, or at all, to do anything by way of interfering with or controlling the proposed exercise, except in so far as the Acts expressly require their consent. And they are not liable for either giving or refusing their consent, when such consent is expressly required (sect. 42).

2. And now it is provided, that, where a tenant for life is dealing with himself, the trustees shall stand in the place of the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction (S. L. Act, 1890, s. 12).

3. Money arising through the exercise of the powers of the tenant for life and in the nature of capital—such as purchase money for land sold, money given for equality of exchange, and fines received for granting leases—must be paid, not to the tenant for life, but to the trustees or into court, and, subject to the prior right of the tenant to decide how it shall be invested, must be invested by the trustees in their own names (*n*), or used for the purposes set out in the Acts (*o*).

TENANT'S POWERS GENERALLY.—The tenant for life may exercise the following powers:

(A.) As regards absolute alienations of the settled land;
A power to sell the settled land or any part thereof;
A power to enfranchise antient freehold lands by selling the seignory thereof, or customary freeholds or copyhold lands, by selling the freehold and inheritance thereof, with or without the mines and minerals;

(*n*) Sect. 22. (*o*) Sect. 21.

A power to exchange the settled land or any part thereof; and

A power to concur in making partition of the settled land (*p*).

Upon any sale (*q*), or exchange, or partition (*r*), easements may be granted or given or taken, as the case may require.

(B.) As regards leases of the settled land:

A power to grant building (including repairing) leases for ninety-nine years;

A power to grant mining leases for sixty years; and

A power to grant any other lease for twenty-one years,—and in any of these three cases, either with or without impeachment of waste; and either of the settled land or of any part thereof, or of any easement over it (*s*);

A power to accept surrenders of leases, and either in respect of the whole land leased or of any part thereof, or in respect of the mines and minerals only comprised therein (*t*);

A power (when the tenant for life is the lord of a manor) to grant licences to the copyholders to demise their copyhold lands, the licence being for such periods only as the lease (in the case of freehold lands) might under the Act have been made for (*u*).

(C.) As regards improvements of the settled land:

A power to apply the capital moneys arising under the Act, in or towards the making and efficient construction of any of the twenty different species of improvements specified in

(*p*) Sects. 3, 19.
(*q*) *Ibid.*
(*r*) S. L. Act 1890, s. 5.
(*s*) S. L. Act 1882, s. 6.
(*t*) Sect. 13.
(*u*) Sect. 14.

the Act (*x*), or which are authorized by the amending Acts (*y*), being improvements on or in connection with or for the benefit of the settled lands,—the improvements specified in the Improvement of Land Act, 1864 (*z*), being, as from the 1st of January, 1883, extended so as to include all the classes of improvements specified in the Settled Land Act, 1882 (*a*). And

(D.) As regards absolute alienations, leases, and improvements generally:

A power to enter into any contract preliminary thereto, and to vary and rescind the same, every such contract enuring for the benefit of the settled land (*b*); and also a power to complete by deed the contract of any predecessor in title of the tenant for life (*c*).

Particular Provisions.

Having stated the provisions of the Acts which are of general application, we will now proceed to state the specific provisions of the Acts relative to the exercise of the powers of the tenant for life under the Act.

1. SALES.—The power of sale extends to all the settled lands, including the principal mansion house and the lands occupied therewith. The latter, however, cannot be sold without the consent of the trustees of the settlement or an order of the Court. A house usually occupied as a farmhouse, or a house the site of which with the lands usually occupied therewith does not exceed twenty-

(*x*) S. L. Act 1882, s. 25.

(*y*) S. L. Act 1890, s. 13.

(*z*) 27 & 28 Vict. c. 114, s. 9; see also 33 & 34 Vict. c. 56 (Limited Owners' Residences Act, 1870): 40 & 41 Vict. c. 31 (Limited Owners' Reservoirs and Water Supply Act, 1877); and 60 & 61 Vict. c. 44 (District Councils, Water Supply Facilities Act, 1897).

(*a*) S. L. Act 1882, s. 30.

(*b*) *Ibid.* s. 31.

(*c*) S. L. Act 1890, s. 6.

five acres, is not to be deemed a principal mansion house for the purposes of the Acts (*d*). Every sale is to be made for the best price that can reasonably be obtained (*e*), but (as regards sites for artizans' dwellings) the price may be less than what would be obtainable if the land were sold for another purpose (*f*). The sale may be in one lot or in several lots, and either by public auction or by private contract (*g*), and with or without a reserve price or power to buy in (*h*), and subject or not subject to any stipulations regarding title, evidence of title, or otherwise (*i*). It may be made subject to any restriction regarding the subsequent user of the land, or regarding building thereon, and subject to any reservation of mines and minerals or mining rights (*k*). When it is of land subject to any incumbrance, the tenant for life may (with the consent of the incumbrancer) charge the incumbrance on other part of the settled land in exoneration of that sold (*l*). Also, in connection with a sale (if it is for building purposes), the tenant for life may, for the benefit of the residents on the settled land, cause any parts of the settled land to be appropriated and laid out for streets or the like, or for gardens or the like; and may provide that the parts so appropriated shall be vested in trustees, for securing their continued appropriation to those purposes. And he may execute the proper deed in that behalf, and have it enrolled in the Central Office of the Supreme Court of Judicature (*ll*).

In completion of the sale, the tenant for life may, as regards the land sold, or as regards easements and the like, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner necessary

(*d*) S. L. Act 1890, s. 10. *Re Sebright's Settled Estates*, (1886) 33 Ch. D. 429.
(*e*) S. L. Act 1882, s. 4, sub-s. (1).
(*f*) 53 & 54 Vict. c. 69, s. 18; c. 70, s. 74, sub-s. (1).
(*g*) S. L. Act 1882, s. 4, sub-s. (3).
(*h*) *Ibid.* sub-s. (4).
(*i*) *Ibid.* sub-s. (5).
(*k*) *Ibid.* sub-s. (6); and see sect. 17.
(*l*) Sect. 5.
(*ll*) Sect. 16.

for giving effect to the sale (*m*). This deed operates to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject, of course, to all estates which have priority to the settlement, and to all estates made under powers in the settlement for securing moneys actually raised at the date of the deed, and to all leases or other alienations already made for value and binding on the settlement (*n*). If the deed comprises copyhold or customary land, it is to be entered on the court rolls, and the purchaser is to be admitted, on the payment of the customary fines and fees, without any surrender or other act (*o*). And on any grant in fee-simple for building purposes, subject to a perpetual rent, the reservation operates, under the Settled Land Act, 1890 (*p*), to create a rentcharge in fee-simple, and to attach thereto all the remedies for the recovery of a proper rentcharge which are given by the Conveyancing Act, 1881.

A tenant for life, even when by the settlement he is impeachable for waste, may with the consent of the trustees, or by order of the court, cut and sell timber on the settled land ripe for cutting. Three-fourth parts of the net proceeds are to be set aside as capital money (*q*); where the settled land with the timber on it is sold, the tenant for life is not allowed the value of the timber (*r*).

2. EXCHANGES AND PARTITIONS.—Every exchange or partition is to be made subject to the same conditions in regard to consideration, reservation of minerals, restriction on user and incumbrances, as apply in the case of a sale (*supra*, p. 466). Where money is required for equality of

(*m*) Sect. 20, sub-s. (1).
(*n*) Sect. 20, sub-s. (2).
(*o*) Sect. 20, sub-s. (3); *In re Naylor and Spendla*, (1887) 34 Ch. D. 217.
(*p*) Sect. 9.
(*q*) Sect. 35.
(*r*) *Re Llewellin, Llewellin* v. *Williams*, (1888) 37 Ch. D. 317.

exchange or partition, the tenant for life may raise the same, by mortgage of the settled land, either in fee simple or for a term of years. The exchange or partition is carried out by a deed which operates in like manner, *mutatis mutandis*, as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*s*). Under the Settled Land Act, 1890, sect. 5, in such deed, easements may be reserved or granted over the settled land or over any other land; and easements may be exchanged for easements, or for land, and may be given or taken on partition. But the mansion-house and demesne can be exchanged by the tenant for life only with the consent of the trustees or by an order of the court (*t*).

3. ENFRANCHISEMENTS.—Every enfranchisement may be made either with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to, or held or enjoyed with, the land enfranchised, or reputed so to be (*u*); and, when money is required for enfranchisement, the tenant for life may raise the same by mortgage of the settled land either in fee simple or for a term of years (*x*).

4. LEASES.—The power of leasing, like that of sale, extends to all the settled land, but a lease of the mansion-house and demesne cannot be made without the consent of the trustees, or an order of the court (*t*). Every lease is to be by deed, except leases for terms not exceeding three years, which may be made by any writing under hand (*y*). It must take effect in possession not later than twelve months after its date (*z*); and it is to reserve the best rent than can reasonably be obtained, regard being had to any fine taken (which fine is declared to be capital money) (*a*), and to any money laid out, or to be laid out,

(*s*) Sect. 20, sub-ss. (2), (3).
(*t*) S. L. Act 1890, s. 10.
(*u*) S. L. Act 1882, s. 4, sub-s. (7).
(*x*) Sect. 18.
(*y*) S. L. Act 1890, 7 (3).
(*z*) S. L. Act 1882, s. 7, sub-s. (1).
(*a*) S. L. Act 1884, s. 4.

for the benefit of the settled land, and generally to the circumstances of the case (*b*). It is to contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days (*c*). A counter-part of every lease is to be executed by the lessee and delivered to the tenant for life, of which execution and delivery the execution of the lease by the tenant for life is sufficient evidence (*d*).

And as regards Building Leases (*e*):—Every building lease is to be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreed to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair buildings, or having executed, or agreeing to execute, on the land leased, an improvement for or in connection with building purposes. A peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or for any less part of the term; and the building lease may give the lessee an option of purchase, to be exercised within any agreed number of years, not exceeding ten years (*f*). Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—(1) the annual rent reserved by any lease is not to be less than ten shillings; (2) the total amount of the rents reserved on all leases for the time being granted is not to be less than the total amount of the rent which, in order that the leases may be in conformity with the Act, ought to be reserved in respect of the whole land for the time being leased; and (3) the rent reserved by any lease is not to exceed one-fifth part of the full annual value of the

(*b*) S. L. Act 1882, s. 7, sub-s. (2); and *supra*, p. 467, n. (*f*).
(*c*) Sect. 7, sub-s. (3).
(*d*) *Ibid.* sub-s. (4).
(*e*) Sect. 8.
(*f*) S. L. Act 1889, s. 2.

land comprised in that lease, with the buildings thereon, when completed.

In connection with any building lease, the tenant for life may, for the general benefit of the residents on the settled land, make an appropriation of a portion of the settled land for streets, gardens, and the like, similar to that for which provision is made in connection with sales (*supra*, p. 467), and may also provide for securing its continued appropriation for these purposes (*g*).

And as regards Mining Leases (*h*) :—(1) The rent may be made to be ascertainable by, or to vary according to, the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land or any other land, or by or according to any facilities given in that behalf, or (under the Act of 1890) (*i*), by or according to the price of the minerals gotten, which price may be ascertained as in the Act prescribed; and (2) a fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent according to acreage or quantity in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent, other than the fixed or minimum rent. The lease may be made partly in consideration of the lessee having executed, or agreed to execute, on the land leased, an improvement of the kind authorized by the Act for or in connection with mining purposes.

A mining lease may be made with or without an exception or reservation of other mines or minerals, and with or without a grant or reservation of powers of working, and of wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land or any other land (*k*).

(*g*) S. L. Act 1882, s. 16.
(*h*) Sect. 9.
(*i*) Sect. 8.
(*k*) S. L. Act 1882, s. 17.

Where the tenant is impeachable for waste, three-fourth parts, and where he is not impeachable, one-fourth part, of the rent is to be set aside as capital money (*l*), unless the settlement itself provides to the contrary.

And generally, as regards both Building and Mining Leases, where it is shown to the court with respect to the district in which any settled land is situate, either—(1) that it is the custom for land therein to be leased or granted for building or mining purposes for longer terms or on other conditions than the terms or conditions specified in that behalf in the Act, or in perpetuity; or (2) that it is difficult to make leases or grants for building or mining purposes of land therein, except for longer terms, or on other conditions than the terms and conditions specified in that behalf in the Act, or except in perpetuity, the court may (*m*), if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

And upon any lease, and in completion thereof, the tenant for life may, as regards the land leased (including copyhold or customary or leasehold land), and as regards easements or other rights or privileges leased, convey the lands or create the easements by deed for the term of the lease (not exceeding the estate or interest the subject of the settlement), to the extent of giving full effect to the lease; and the deed will operate in like manner, *mutatis mutandis*, as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*n*).

As regards the leasing powers generally of a tenant for

(*l*) Sect. 11; *Re Chaytor*, [1900] 2 Ch. 804.

(*m*) Sect. 10.

(*n*) Sect. 20.

life, these extend to the making of, (i) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease which, if made by the predecessor, would have been binding on the successors in title; and (ii) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and (iii) a lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under the Act or otherwise (*o*).

The tenant for life may accept, with or without consideration, a surrender of any lease of settled land (*p*), whether made under the Act or not, in respect of the whole land leased or any part thereof (with or without an exception of all or any of the mines and minerals therein), or in respect of mines or minerals. On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned; and the tenant for life may, of course, thereafter make a new or other lease, and the new or other lease may comprise additional land. On accepting such surrender and making such new or other lease, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new lease.

5. IMPROVEMENTS.—Where improvements are proposed to be made by the tenant for life with capital money arising under the Act, the Act provides as follows (*q*): that the tenant for life shall, in general, submit for approval to the trustees of the settlement, or to the

(*o*) Sect. 12.
(*p*) Sect. 13.
(*q*) Sect. 26.

court, as the case may require, a scheme for the execution of the improvements, showing the proposed expenditure thereon, although the court may dispense with such scheme in a proper case (*r*). And where the capital money to be expended is in the hands of the trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement,—either (1) on a certificate of the Board of Agriculture, certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is made conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or (2) on a like certificate of a competent engineer or able practical surveyor nominated by the trustees (and approved by the Board or by the court), which certificate is also conclusive as aforesaid; or (3) on an order of the court directing or authorizing the trustees to so apply a specified portion of the capital money. And where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may if it thinks fit, on a report or certificate of the Board, or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement; or such moneys may be paid out to the trustees of the settlement to be in like manner applied by them (*s*).

And as regards the subsequent maintenance of the improvements so made, the Acts provide (*t*) that the

(*r*) S. L. Act 1890, s. 15.
(*s*) S. L. Act 1882, s. 26.
(*t*) Sect. 28.

tenant for life, and each of his successors in title, having under the settlement a limited estate or interest only in the settled land, shall, during such period, if any, as the Board of Agriculture by certificate in any case prescribe, maintain, and repair, at his own expense, every improvement executed under the Act. And where a building or work in its nature insurable against loss or damage by fire is comprised in the improvement, he shall insure and keep insured the same, at his own expense, in such amount, if any, as the Board shall by certificate in any case prescribe; and he shall from time to time, if required by the Board, on or without the suggestion of any person having under the settlement any estate or interest in the settled land in possession, remainder, or otherwise, report to the Board the state of every improvement executed under the Act, and the fact and particulars of the fire insurance, if any. And if the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions aforesaid, or does any act in contravention thereof, any person having under the settlement any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, will be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act. And with a view to enabling the tenant for life not only to execute in the first instance, but also thereafter to maintain in good repair, the improvements aforesaid, the Act provides (*u*) that he may, for that object, commit waste (not being equitable waste) with impunity, either as regards minerals, timber, or otherwise.

6. Capital Moneys.—Capital moneys, as has been pointed out, are moneys in the nature of capital arising

(*u*) Sect. 29.

from dealings with the settled land under the powers conferred by the Acts on the tenant for life. They are, therefore, receivable upon the trusts and for the purposes of the settlement, and are to be paid either to the trustees of the settlement or into court. The tenant for life has the option as to which of these modes of payment shall be adopted (*x*). Where the capital moneys are paid to the trustees, there must be two trustees at least (unless the settlement authorizes one trustee to receive such moneys) (*y*); and the trustees or (if the case is so) the trustee may give an effectual receipt for the moneys so paid to them or him (*z*). Each trustee is to be answerable for his own receipts only, and not for any loss of capital moneys, even when received by him, unless the loss arises through his own wilful default (*a*). Every trustee may also reimburse himself his proper charges and expenses out of the capital moneys (*b*).

Capital moneys arising under the Acts will be applicable primarily for the specific purpose (if any) for which they were raised, *e.g.*, to pay for equality of exchange, or to pay the consideration-moneys or expenses on an enfranchisement; and, subject thereto, and to any other payments primarily payable out of the capital moneys, they are to be applied in all or some or one of the following ways (*c*), that is to say:

(i) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest the trust moneys of the settlement. The securities in which trustees may now invest trust moneys are set out in sect. 1 of the Trustee Act, 1893.

(ii) In the discharge, purchase, or redemption of

(*x*) Sect. 22; *Cookes* v. *Cookes*, (1887) 34 Ch. D. 498.
(*y*) Sect. 39.
(*z*) Sect. 40.
(*a*) Sect. 41.
(*b* Sect. 43.
(*c*) Sect. 21; *Clarke* v. *Thornton*, (1887) 35 Ch. D. 307.

incumbrances (*d*) affecting the inheritance of the settled land, or of the land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land:

(iii) In payment for any improvement authorized by the Act:

(iv) In payment for equality of exchange or partition of (other) settled land:

(v) In the purchase of the seignory of any part of the settled land, being freehold land, or in the purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi) In the purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or for life, or for years determinable on life:

(vii) In the purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, and subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land:

(viii) In the purchase, either in fee simple or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix) In payment to any person becoming absolutely entitled to, or empowered to give an absolute discharge for, the capital moneys:

(x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the

(*d*) *Re Richardson*, [1900] 2 Ch. 785.

powers (*e*), or the execution of any of the provisions of the Act:

(xi) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder (*f*).

7. SECURITIES ACQUIRED WITH CAPITAL MONEY.—Capital moneys received by the trustees of the settlement are to be invested by them according to the direction of the tenant for life, and, failing any such direction, at their (the trustees') own discretion, but with such (if any) consents as the settlement requires (*g*); and no investment is to be altered or varied unless with the consent of the tenant for life (*h*). Capital paid into court is to be invested, or otherwise applied, under an order of the court to be obtained by the tenant for life, or by the trustees (*i*), or it may be paid out to the trustees to be duly invested by them. The investments, and the moneys until invested, are to be substituted for the settled land, and are to be considered as land for all the purposes of alienation or devolution (*k*). The income is to go and be paid as the rents and profits of the settled land would be. And, in particular, when the capital money is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement, or, as the case may be, the court,—and, in the case of the court, on the application of any party interested in that money,—may, notwithstanding anything in the Act, require and cause the same to be laid out, invested, accumulated and

(*e*) *Re Smith's Settled Estates*, [1891] 3 Ch. 65.

(*f*) *In re Lord Aylesford's Settled Estates*, (1886) 32 Ch. D. 162.

(*g*) Sect. 22, sub-s. (2).

(*h*) *Ibid.* (sub-s. 4); *In re Clitheroe Estate*, 28 Ch. D. 378; 31 Ch. Div. 135.

(*i*) Sect. 22, sub-s. (3).

(*k*) *Ibid.* sub-s. (5); *Re Bond*, (1901) 1 Ch. 15.

paid in such manner as will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be (*l*).

8. Lands Acquired with Capital Money.—Lands acquired by purchase with capital moneys arising under the Act, or acquired by exchange or on partition, are to be settled to, for, and upon the uses, purposes, and trusts of the settlement (*m*); and, in particular, (1) freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging; and (2) copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement, on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as aforesaid; but so, nevertheless, that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

9. Heirlooms.—Regarding heirlooms and personal chattels, settled in trust so as to devolve with land until a tenant in tail of the land entitled thereto by purchase (as opposed to descent) is born or attains the age of twenty-one years, the Act provides (*n*) that the tenant

(*l*) Sect. 34.
(*m*) Sect. 24.
(*n*) Sect. 37; *Fane* v. *Fane*, (1875) 2 Ch. D. 711; *Re Carnac*,

for life of the land may (but only with the sanction of the court) sell the heirlooms, or chattels, or any of them. And the sale-proceeds are to be dealt with as capital moneys arising under the Act; or they may be invested in the purchase of other chattels of the like or any other nature, to be settled upon the like trusts as the heirlooms or chattels sold.

10. TRUSTS FOR SALE.—In a trader's settlement (as it is called, to distinguish it from a strict settlement), the settled land is usually settled upon trust for sale, and the rents and profits of the land until sale, and the income of the sale-proceeds when invested, are usually given to one or more persons for his, her, or their lives, and the capital moneys are afterwards divisible among the children of marriage and their descendants; and to such a settlement, all the beneficial provisions of the Settled Land Acts are applicable, *mutatis mutandis* (*o*). It is obvious, however, that such land is for all purposes of transmission and devolution merely personal estate; *consequently, the trust funds are not to be invested in the purchase of land,* unless there is an express provision in the settlement authorizing such an investment (*p*). As already pointed out, there is this further distinction between strict settlements and traders' settlements, that, by the provisions of the Settled Land Act, 1884 (*q*), a tenant for life under a trader's settlement can only exercise, with the sanction of the court, the powers conferred upon the tenant for life under a strict settlement.

(1885) 30 Ch. D. 136; *Duke of Marlborough* v. *Sartoris*, (1885) 30 Ch. D. 127; 32 Ch. D. 1, 616; *Earl Radnor's Will*, (1890) 45 Ch. D. 402.

(*o*) S. L. Act 1882, s. 63.

(*p*) *Ibid.* sub-s. (2).

(*q*) Sects. 6, 7.

CHAPTER XXV.

OF REGISTRATION OF TITLE TO LAND.

To modern conveyances, it has been commonly imputed as a defect, that they are not attended with sufficient notoriety (*r*); and it is undoubtedly true, that modern conveyances have been for the most part private, only a very few of them requiring enrolment, and none of them having, by the common law, required registration. However, for the county of Middlesex and for the county of York, registration was latterly made essential.

I. Registration of Deeds.

The Middlesex Registry Act, 1708 (7 Anne, c. 20), is still in force, excepting a few sections, and has been recently amended by the Land Registry (Middlesex Deeds) Act, 1891 (*s*), by which the Middlesex Registry has been amalgamated with the Land Registry hereinafter mentioned. The earlier Registry Acts relating to Yorkshire, viz., 2 & 3 Anne, c. 4, and 6 Anne, c. 20 (for the West Riding of that county), the 6 Anne, c. 62 (for the East Riding), and the 8 Geo. II. c. 6 (for the North Riding), have been recently repealed, and their provisions, with certain amendments, re-enacted for the whole county, by the Yorkshire Registries Act, 1884 (*t*). The Acts have provided, that any deed, conveyance, or devise, which shall affect land of freehold tenure, situate in either of those two counties, but not including leases at rack rent, or for twenty-one years or under, where the

(*r*) 2 Bl. Com. p. 342.
(*s*) 54 & 55 Vict. c. 64.
(*t*) 47 & 48 Vict. c. 54, amended by the 48 Vict. c. 19, and the 48 & 49 Vict. c. 26.

actual possession goes along with them, shall be fraudulent and void against a subsequent purchaser or mortgagee, unless a memorial thereof shall have been registered in such manner and within such period as the Acts direct. But, in fact, such unregistered dealings were never *void*, if the subsequent purchaser or mortgagee had notice of them (*u*); and by the Vendor and Purchaser Act, 1874 (*x*), s. 8, unregistered wills were made good in favour of a purchaser from the devisee, provided that he registered his purchase deed before any purchaser from the heir-at-law had registered his purchase deed. Now, however, as regards lands in Yorkshire, a document is really and truly void if unregistered, whether the subsequent purchaser has notice of it or not, unless in cases of actual fraud (*y*). The Registry Acts for Yorkshire contain also provisions for registering titles which are not evidenced by any document, *e.g.*, intestacies, liens, and equitable mortgages, effected by the mere deposit of title deeds.

But, excepting as regards Middlesex and Yorkshire, and some parts of Bedfordshire (*z*), the policy of the registration of *deeds* has never been adopted in England, opinions having been very divided as to its utility (*a*); and a registration of the *title* to land was never compulsory in any part of England until after the passing of the Land Transfer Act, 1897 (*b*). That Act has made it compulsory in the County of London; and the intention is that it shall in due course become compulsory over the rest of England, where it is, in the meantime, optional with the party.

In the year 1862, an office called the office of "Land Registry" was established by the Land Registry Act,

(*u*) *L'Neve* v. *L'Neve*, (1747) 1 Ves. sen. 64; *Tunstall* v. *Trappes*, (1830) 3 Sim. 301; *Bradley* v. *Riches*, (1878) 9 Ch. D. 212.

(*x*) 37 & 38 Vict. c. 78.

(*y*) 47 & 48 Vict. c. 54, s. 14; *Battison* v. *Hobson*, [1896] 2 Ch. 403.

(*z*) 15 Car. 2, c. 17, s. 8.

(*a*) 2 Bl. Com. 343.

(*b*) 60 & 61 Vict. c. 65.

1862. By that statute provision was made for the registration of an indefeasible title to lands, when the title (on the prescribed investigation thereof) was found to be sufficiently good. Thirteen years later was passed the Land Transfer Act, 1875 (*c*), by which an elaborate scheme for the registration of title was enacted, and the office itself reconstituted. The work of the office was further increased upon the coming into operation of the Land Charges Registration and Searches Act, 1888 (*d*), and this work bids fair to be now further considerably increased under the Land Transfer Act, 1897 (*e*), and the Land Charges Act, 1900 (*f*).

II. Registration of Land Charges.

The Land Charges Registration and Searches Act, 1888 (the provisions of which Act it is more convenient to state before proceeding to the Land Transfer Acts, 1875 and 1897), has enacted as follows: First, as regards "writs and orders affecting land," that there shall be established and kept at the office of Land Registry a special register, called "the Register of Writs and Orders affecting Land"; and that in such register there may be registered any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment statute or recognizance, or any order appointing a receiver or sequestrator of land (sect. 5). The entry is made in the name of the person whose land is affected, and the registration endures for five years, and is in lieu of the registration of such writ or order in the Central Office. Any such writ or order, unless registered, is void against a purchaser for value, mortgagee, or lessee of the land (sect. 6), existing registrations in the Central Office (during the remainder of their currency), and *lites pendentes* duly registered at the Central Office, being

(*c*) 38 & 39 Vict. c. 87.
(*d*) 51 & 52 Vict. c. 51.
(*e*) 60 & 61 Vict. c. 65.
(*f*) 63 & 64 Vict. c. 26.

excepted; but under the Settled Land Act, 1890 (*g*), the registration of any such writ or order may be vacated under an order of the court to be obtained for the purpose. And the Act of 1888 has enacted, secondly, as regards "Deeds of Arrangement," that there shall be kept at the office of Land Registry a special register, called "the Register of Deeds of Arrangement"; and that deeds of arrangement may be registered therein in the name of the debtor (sect. 7), on the application either of the trustee of the deed, or of any creditor taking the benefit of the deed (sect. 8). Any such deed, unless registered, is void, against a purchaser for value, mortgagee, or lessee of the land. This registration is additional to, and not in substitution for, the registration required by the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57). Thirdly and lastly, the Act of 1888 has enacted, as regards "Land Charges" (*h*), that there shall be kept at the office of Land Registry a special register, called "the Register of Land Charges"; and that land charges may be registered therein. The registration, in the case of freehold lands, is made in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and, in the case of copyhold lands, in the name of the tenant on the court rolls at that time, and also (if it should so happen) in the name of the person who (being entitled only to a lease for life or lives, at a rent, or for a term of years) has procured the rentcharge to be created (sect. 10). The Act expressly

(*g*) 53 & 54 Vict. c. 69, s. 19.

(*h*) "*Land charge*" is defined by the Act (sect. 4) as meaning a rent or annuity, or principal moneys payable by instalments or otherwise, with or without interest, charged (otherwise than by deed) upon land, under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges, and expenses incurred by him, under such Act; or the moneys advanced by him for repaying such moneys, or such costs, charges, and expenses; also, a charge under sect. 35 of the Land Drainage Act, 1861, or under sect. 29 of the Agricultural Holdings Act, 1883: but not a "rate" or "scot."

provides (by sect. 12), that every land charge created after the 31st December, 1888, which shall not have been duly registered under the Act, shall be void against a purchaser for value, mortgagee, or lessee of the land. Also (by sect. 13), a land charge created before that day is required to be registered within a year after the first assignment thereof which shall be executed after the 31st December, 1888.

By the Land Charges Act, 1900, the business of registry of judgments, hitherto carried on in the central office of the Supreme Court, is transferred to the office of Land Registry (sect. 1). The registry of judgments is closed, and no judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, or before or after the commencement of the Act, is to operate as a charge on land, until a writ or order for the purpose of enforcing it is registered under sect. 5 of the Land Charges, Registration, and Searches Act, 1888 (sect. 2). Sect. 6 of that Act is to apply to every writ and order affecting land issued by any court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, or before or after the commencement of the Act, and to every delivery in execution or other proceeding taken in pursuance of such writ or order (sect. 3). And finally, every instrument made after the passing of the Act, which could be registered under it, or under the Land Charges, Registration, and Searches Act, 1888, is to be registered under it, and not under the Middlesex Registry Act, 1708.

III. Registration of Title.

The Land Transfer Acts, 1875 and 1897, remain to be considered. And first, these Acts, in their provisions regarding registration (which provisions alone we are now considering), apply to both freehold and leasehold lands; but the Acts do not apply to copyhold lands whether

copyhold lands, properly so called, or customary freehold lands (*i*).

The Acts provide for the registration of the *title;* and the title to be registered is (in the case of *freehold* lands) the fee simple title, and (in the case of *leasehold* lands) the title for the whole estate created by the lease. The title registered may (in either case) be either an *absolute* title, a *qualified* title, or a *possessory* title, according to the distinctions to be presently mentioned (*k*).

Under the Act of 1897 settled land (that is to say, the *title* to settled land) may also be registered, the registration in that case being either in the name of the tenant for life or in the names of the trustees of the settlement, or (when there is any overriding power) in the names of the donees of that power, the proper inhibitions and restrictions being in such case entered on the register (*l*).

By the Act of 1897, s. 20, it is made competent to the Crown, by Order in Council, to declare, as respects any county or part of a county mentioned or defined in the order, that on and after the day in that behalf specified in the order, registration shall be "*compulsory on sale*" of the land; and thereupon no purchaser shall, under his purchase deed executed after that day, acquire the legal estate in the land purchased (being land situate within the county or part of the county mentioned in the order), unless and until he is registered as the proprietor of the land, registration with a *possessory* title being, however, sufficient to satisfy the last-mentioned requirement. And pursuant to these provisions of that section, the late Queen (by Order in Council dated the 18th July, 1898), declared, as regards the county of London, that registration of the title to land should be compulsory on a sale in the several portions of the county which are mentioned therein, at the dates therein mentioned. These dates were altered several times by subsequent Orders; but the City of London, which

(*i*) *The Queen* v. *Middlesex Registrar.* (1889) 21 Q. B. D. 555.

(*k*) Act 1875, s. 7.

(*l*) Sect. 6.

was the portion longest excepted, became finally subject to the Order, on 1st July, 1902. (See Order in Council, 6th March, 1902.)

1. INTERESTS WHICH MAY NOT BE REGISTERED.—However, nothing in the Act (or, of course, in the Order in Council) is to render compulsory the registration of title, when the title is to any of the following descriptions of land, that is to say:—(1) Incorporeal hereditaments; (2) Mines and minerals owned separately from the surface; (3) Leases having less than forty years to run or two lives yet to fall in; (4) An undivided share in land; (5) Freehold lands intermixed with and indistinguishable from lands of any other tenure; and (6) Corporeal hereditaments which are parcel of a manor, and which are included in a sale of the manor as such (that is to say, copyhold hereditaments, including customary freeholds but not ancient freeholds). But, as regards undivided shares, where *all* the undivided owners sell concurrently, the conveyance on sale would, *semble*, fall within the compulsory provisions of the Act. When mines and minerals are shown to belong to the surface-owner, the registration of his title will (by means of a special note to be added by the Registrar), state that fact, as it will also do, in any case in which the mines have been worked or otherwise opened, and have been enjoyed according to the title, and no other or adverse title thereto is suggested. On the other hand, where the ownership of the mines and minerals is shown (or is admitted) to be in another or others, the Registrar will (by means of such special note as aforesaid) state that they are not included in the registration (*m*).

2. WHO MAY REGISTER.—The application to be put on the register, either in the applicant's own name or in the name or names of his nominee or nominees, may be made (in the case of *freehold* lands) by any person,—(1) who has contracted to buy for his own benefit an

(*m*) Act 1875, s. 69; General Rule, 67, Act 1897.

estate in fee simple (subject or not to incumbrances); or (2) who is entitled for his own benefit, at law or in equity, to such an estate; or (3) who is capable of disposing for his own benefit by way of sale of such an estate. But, in the case first supposed, the applicant must have obtained the consent of the vendor to the application being made. And (in the case of *leasehold* lands) the application may be made by any person,—(1) who has contracted to buy the leaseholds; or (2) who is entitled thereto for his own benefit either at law or in equity; or (3) who is capable of disposing of the same for his own benefit by way of sale. But, in the case first supposed, (just as in the like case with freeholds,) the applicant must have obtained the consent of the vendor to the application being made (*n*).

3. MODE OF REGISTERING.—For regulating the mode of the application and the procedure thereon, and generally for carrying into effect the compulsory and other provisions of the Act, General Rules (dated the 2nd August, 1898) have been made under sect. 111 of the Act of 1875, and sect. 22 of the Act of 1897. And, under these Rules (which repeal all the prior Rules), it is provided, that the Land Register shall consist of three parts, viz., (1) the Property Register; (2) the Proprietorship Register; and (3) the Charges Register; and the title to each registered property is to be distinguished upon the register by a number; and the property itself is to be defined by means of a plan (to be filed in the Land Registry), and the description of the property in the Property Register is to refer to such plan. There is also to be kept in the Land Registry (besides an Index of Proprietors' Names, and an Index or List of Pending Applications for Registration) an Index Map; and upon such Index Map, each registered property is to be marked with its original register number, and is also to be defined by a distinctive colour. A separate Index Map is to be kept for leasehold titles, leaseholds

(*n*) Act 1875, s. 11.

(where situate within the compulsory area) being brought within the compulsory provisions of the Act by the General Rules 58—60. By these rules it is provided that,—as regards all existing leases which at the date of the execution of the "*assignment on sale*" thereof (being an assignment dated subsequently to the day specified in the Order in Council) have at the least forty years still to run, or two lives yet to fall in; and as regards also all grants of leases (or of underleases) for a term of forty years or more or for two or more lives (being grants executed after the specified day)—the assignment or grant shall operate as an agreement only, and shall not pass the legal estate, unless and until the assignee or grantee is registered as the proprietor of the land, registration with a *possessory* title being, however, sufficient to satisfy the last-mentioned requirement.

4. TITLE WHICH MAY BE REGISTERED.—Where the application to be put on the register is an application for registration with an *absolute* title, there is to be first a laborious investigation of the title, just as under the present practice on a sale of lands; and persons objecting to the registration are invited by advertisements to come in and object before the Registrar. It is only when the Registrar is fully satisfied as to the validity of the title, that the applicant will be registered with an absolute title. If upon any such application the Registrar is not satisfied of the validity of the title, then the applicant (if willing to be so registered) will be registered with a *qualified* title, that is to say, with a title which is absolute save for any estate right or interest which the Registrar excepts on the registration, and all which excepted estates rights or interests are to be entered on the register. On the other hand, when the application is (and in most cases it will be) for registration with a *possessory* title only, there is no investigation of the title at all, but the applicant merely leaves his conveyance on sale (in the case of freeholds) or his assignment

on sale or his lease (in the case of leaseholds), or else makes a statutory declaration of his title, furnishing in either case such a description of the parcels as will enable the property to be identified on the Ordnance Map.

5. COMPLETION OF REGISTRATION.—The registration is completed by entering in the Property Register a description of the parcels with a reference to the filed plan thereof; and by entering on the Proprietorship Register a statement as to whether the title is absolute, or is qualified, or is possessory, together with the name, address and description of the proprietor, and any restrictions, inhibitions, or cautions affecting his right to dispose of the property, and by entering in the Charges Register a note of any incumbrances prior to registration, and a note of such other charges, etc., as (under the Acts and Rules) ought to be entered therein.

6. LAND CERTIFICATE.—On the completion of the registration, the registered proprietor receives from the Registrar a *Land Certificate* in the case of freeholds, and also, *semble*, in the case of leaseholds; the land certificate stating whether the title is absolute, or qualified, or possessory only.

7. EFFECT OF REGISTRATION.—Once the registration of the title has been so completed (being the first registration of the title), the Acts provide that it shall have the following effect. As regards *freeholds* (*o*), there shall vest in the registered proprietor (when he is registered with an absolute title) an estate in fee simple, free from all other estates and interests (including those of the Crown), but subject (1) to any incumbrances entered on the register; (2) to such liabilities and incidents of tenure as are by the Acts declared not to be incumbrances; and (3) to any unregistered estates or interests derived under the registered proprietor. Where the registered proprietor is registered with a possessory title, the like fee

(*o*) Act 1875, ss. 7, 8, 18.

simple estate shall vest in him, subject to the like qualifications, and subject also to any estate right or interest adverse to (or in derogation of) the registered title. As regards *leaseholds* (*p*), there shall vest in the first registered proprietor (where he is registered with an absolute title) the possession of the land for all the estate created by the lease, free from all other estates and interests (including those of the Crown), but subject (1) to all covenants (express and implied) and obligations and liabilities incident to the estate; (2) to any incumbrances entered on the register; (3) to such liabilities and incidents of tenure as are by the Acts declared not to be incumbrances; and (4) to any unregistered estates or interests derived under the registered proprietor. Where the registered proprietor is registered with a possessory title only, the like possession of the land for all the estate created by the lease shall vest in him subject to the like qualifications, and subject also to any estate right or interest adverse to (or in derogation of) the registered title (*q*). And, of course, as regards both freeholds and leaseholds, when the title registered is a *qualified* title, the estate which by registration is vested in the first registered proprietor will be subject also to the estates which were excepted by the Registrar upon the first registration.

When the title to land has once been registered under the Acts, it may be again taken off the register, excepting as regards land situate within any compulsory area (*r*); but while the title remains on the register, the land, when situate within Middlesex or Yorkshire, is exempt from the necessity of registration under the Middlesex and Yorkshire Registry Acts before mentioned (*s*).

Also, as against the registered proprietor, adverse possession will not confer any title to the land (*t*); but,

(*p*) Act 1875, ss. 13, 14, 18; General Rule 47; Act 1897, s. 18, and Schedule.

(*q*) Act 1875, s. 14.

(*r*) Act 1897, s. 17 (1).

(*s*) *Ibid.* s. 17 (3).

(*t*) *Ibid.* s. 12.

where the registration was for a *possessory* title only, and the adverse possession had already commenced at the date of the first registration, that adverse possession may afterwards mature (equally as in the case of unregistered land) (*u*). And even where the first registration was for an *absolute* title, an adverse possession for twelve years may become effective, even against the first registered proprietor, or any subsequent registered proprietor, except a registered proprietor *for value*, should the person in possession apply for and obtain rectification of the register (*x*).

8. QUALIFICATION OF REGISTERED TITLE. — The first registered proprietor will (as already stated) continue subject (unless where and so far as the contrary is expressed on the register) to all those liabilities and incidents of tenure affecting his land which are by the Acts declared *not to be incumbrances;* and the liabilities and incidents of tenure to which the land will so continue subject are (briefly) the following, that is to say:— liability (by reason of tenure) to repair highways, chancels, sea and river walls and embankments, etc.; quit rents, Crown rents, and the like; heriots and customary rights and public rights, and the like; estate duty, succession duty, land tax, tithe rentcharge, and the like; mining estates, and rights or powers outstanding at the date of the first registration; franchises, manorial rights, and the like; and certain leases or agreements for leases and other tenancies (*y*). It is to be noted, however, that under the Act of 1897, where the liabilities and incidents aforesaid appear to the Registrar on the occasion of the first registration of the title to affect the land, they are to be noted by him on the register; and a right of re-entry or right of reverter may also be so noted by him, if it appear at the time of the first registration to

(*u*) Act 1897, s. 12.
(*x*) *Ibid.*
(*y*) Act 1875, s. 18; Act 1897, s. 18, and First Schedule.

affect the land. And, of course, any subsequent registered proprietor will take subject to all the liabilities and incidents of tenure to which the first registered proprietor continues subject. But, as regards the unregistered estates and interests to which, as being derived under the first registered proprietor, he continues subject (as already stated), the subsequent registered proprietor does not take subject thereto, where he is entitled *for value*, and is not a mere volunteer (*z*).

9. Dealing with Registered Land.—A registered proprietor may, by registered instrument, create a mortgage of the registered land, the mortgagee obtaining from the Registrar a certificate of the charge; and the registered proprietor of the land may also sell it, or otherwise alienate it, and, of course, he may (if entitled in fee simple for his own benefit) devise the land. And, whether entitled beneficially or not, the registered land (just like unregistered land) will now vest in his personal representative on his decease (*a*).

A registered proprietor may also deal with the land by an unregistered instrument, for the purpose of creating any estate or interest which his own beneficial estate entitles him to create (*b*); and he may also create a mortgage by deposit, depositing the land certificate or office copy of the registered lease (*c*). And the registered proprietor of a charge (that is to say, a registered mortgagee) may create a sub-mortgage by deposit, depositing his certificate of charge.

10. Statutory Forms.—But the principal intention of the Acts is, that (so far as regards sales and mortgages, and other dealings *inter vivos*), registered dispositions only shall be used. And the General Rules (in the First Schedule thereto) provide short forms of conveyance on

(*z*) Act 1875, ss. 30—33 (freeholds); ss. 35, 38 (leaseholds).
(*a*) Act 1897, s. 1.
(*b*) Act 1875, s. 49.
(*c*) Act 1897, s. 8.

sale (*i.e.*, of transfer), and also short forms of mortgage (*i.e.*, of charge), and of sub-mortgage (*i.e.*, of sub-charge), and short forms for the transfer and discharge of mortgages (*i.e.*, of charges) (*d*); and the forms so provided (with only the necessary modifications) are directed to be used (*e*). For the purpose of introducing the implied covenants under the Conveyancing Act, 1881, the registered proprietor may, in the form, express, that he is transferring or charging as beneficial owner, or as settlor, or as trustee, or as mortgagee, or otherwise as the case may require (*f*); also, in every charge, there are implied (unless the charge itself expressly excludes them) covenants on the part of the mortgagee to pay the principal money with the interest thereon at the appointed time, and to pay the interest half-yearly after the appointed time (*g*); and (where the mortgage is of leaseholds) a covenant on the part of the mortgagee to pay the rent and to observe the covenants, etc., of the lease (*h*). There are also forms provided for exchanges and partitions (*i*); and forms for conveyance in mortmain, and to charitable uses (*k*); also, forms for the conveyance of land subject to conditions restrictive as to the user of the land (*l*). The forms so provided are (by force of the Acts and the Rules) made equally efficacious with the longer and more usual forms of conveyance, or of mortgage and re-conveyance,—*e.g.*, a discharge of mortgage in the form provided, where the mortgage is to a building society or the like, has the same effect as the statutory receipt usually endorsed on the mortgage (*m*). In an assignment of leaseholds to a purchaser, where the transfer is in the prescribed form, the covenants on the part of the vendor and purchaser respectively as to the rents and covenants and conditions of the lease which are

(*d*) Rules 79—127.
(*e*) Rule 146.
(*f*) Rule 148.
(*g*) Act 1875, s. 23.
(*h*) Act 1875, s. 24.
(*i*) Rules 103, 105.
(*k*) Rules, 95, 96.
(*l*) Rule 102.
(*m*) Rule 113.

inserted in an ordinary assignment of leaseholds are implied (*n*) ; and in a mortgage in the prescribed form, all the usual powers of a mortgagee for the realization of his security are implied, unless where and so far as they are expressly excluded by the prescribed form (*o*). A transfer on sale, made by the registered proprietor of a charge, is to operate as a sale and conveyance in exercise of the implied power of sale (*p*).

The Rules also provide for the registration of the personal representative, in the case of a transmission of the title by the death of the registered proprietor (*q*), and for the subsequent registration in his place of the beneficial devisee of the land (*r*), or of any legatee to whom (under the provisions of the Act of 1897) the lands have been appropriated by the personal representative (*s*), and also for the registration of the Official Receiver, in the case of a transmission in bankruptcy, and of the trustee for the creditors in the case of a transmission in bankruptcy or liquidation (*t*).

Upon a conveyance on any sale by the registered proprietor of the lands, the prescribed form of transfer passes to the purchaser the whole registered title of the vendor (whether such title be absolute, or qualified, or possessory), subject only to the incumbrances (if any) entered on the register, and to the liabilities and incidents of tenure which by the Acts are declared not to be incumbrances. When the title of the vendor is qualified, the purchaser takes subject also to the estates and interests which are excepted on the register ; and (when the title is possessory) to any adverse estate right or interest which was subsisting at the date of the firstregistration of the title (*u*). And similarly, upon the transfer of a mortgage, if the prescribed form of transfer is used, the transferee

(*n*) Act 1875, s. 39.
(*o*) Act 1875, ss. 25—27 ; Act 1897, s. 9 (2).
(*p*) Act 1897, s. 9 (1).
(*q*) Rule 128.
(*r*) Rule 130.
(*s*) Rule 130.
(*t*) Rules 138—145.
(*u*) Act 1875, ss. 30—32.

takes the title of his transferor, according as such title is absolute, or is qualified, or is possessory (*x*) : and where the transfer is for value, he is not affected by any irregularity in the original mortgage (*y*).

11. EVIDENCE OF TITLE.—Consequently, the purchaser of registered land may not (*z*) (and a mortgagee of such land need not) require any evidence of the title of his vendor (or mortgagor), other than and except (1) what may be obtained from an inspection of the register, coupled with a statutory declaration as to the continued existence or otherwise of the liabilities and incidents of tenure which are by the Acts declared not to be incumbrances, (2) an abstract dealing with the incumbrancces (if any) which were entered on the register on the first registration of the land as subsisting at the date of such first registration ; and (where the title is qualified) (3) an abstract dealing with the estates which were then excepted on the register; or (where the title is possessory) (4) an abstract dealing with the title to the land as subsisting at the date of the first registration of the land. Also, the purchaser can not require the vendor to enter into any covenants for title, in the case of a registered absolute title ; and his covenants for title (in the case of a registered qualified or possessory title) will be limited to the estates and interests which are left unaffected by the registration (*a*).

12. CHECKS ON TRANSFERS.—For the protection of unregistered estates interests and rights (including, in the case of settled lands, the estates in remainder), the Acts have provided for notices, cautions, inhibitions, and restrictions being entered in the register or noted against the registered title ; and the General Rules provide in great detail for such notices, cautions, etc., both as

(*x*) Act 1875, ss. 22, 40 ; Act 1897, s. 18, First Schedule.

(*y*) Act 1897, s. 18, First Schedule.

(*z*) *Ibid.* s. 16 (1).

(*a*) *Ibid.* sub-s. (3).

regards their effect, while they continue to have effect, and as regards their discharge or removal. The first schedule to the Rules gives the prescribed forms of the notices, cautions, inhibitions, and restrictions, and shows also the circumstances in which (and the purposes for which) they are available.

For the greater protection of purchasers and mortgagees of registered land, it is provided by the Act of 1897 (sect. 8), that, so long as a land certificate, office copy of a registered lease, or certificate of charge, is outstanding, it shall be produced to the registrar on every entry in the register of a disposition by the registered proprietor of the land or charge to which it relates; and on every registered transmission or rectification of the register. And a note of every such entry, transmission, or rectification, is to be officially endorsed on the certificate or office copy; and the like note is to be made on that certificate or office copy, where same is retained in the registry. But the vendor is required, where the certificate or office copy has not been so retained, to deliver it to the purchaser; and a new certificate or office copy will not be readily issued, where the one originally issued is alleged to have been lost.

13. Small Holdings Act, 1892.—The Land Transfer Act, 1875 (by sect. 125), excludes for the future any registration under the Land Registry Act, 1862, before mentioned; and provides (by sect. 126) that any proprietor registered under that earlier Act may, if he choose, re-register under the Act of 1875, although he is not obliged to do so, and until he does the effects of the existing registration under the earlier Act are to remain. And as regards land acquired by county councils, under the provisions of the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), being land acquired by such councils to be sold as small holdings in the nature of allotments for the industrious poor,—such land may be registered, in

like manner as other land is registered, and any small purchaser under the county council may be registered (and, in each case, with an *absolute* title) (*b*), in like manner as any ordinary purchaser would be registered under the Land Transfer Acts, 1875—1897, and with substantially the same results and consequences. The duty of carrying out the Small Holdings Act, 1892, is now, by the Local Government Act, 1893 (56 & 57 Vict. c. 73), devolved upon the parish council in the case of rural parishes.

14. INDEMNITY FOR FRAUDULENT ENTRIES.—The Acts of 1875—1897, and the General Rules made thereunder, which have been hereinbefore referred to, contain also many other provisions (some of them of a very minute character) which it is impossible to summarise in a treatise like the present. But a very important clause of the Act of 1897 (sect. 7), provides for persons being indemnified who are injured by reason of fraudulent entries in the register or by reason of errors and omissions therein or therefrom, which are not capable of rectification, or who are injured by any rectification of the register,—the indemnity being payable out of the Consolidated Fund, and the Government being entitled to recover against the wrong-doer the amount so paid. And the Act of 1897 also provides (by sect. 21) for the creation of an insurance fund in aid of the liability of the Consolidated Fund, and in recoupment of all payments made out of such latter fund.

15. OFFICIAL SEARCHES.—Registered dealings with land, although they have much to recommend them, are nevertheless attended with certain disadvantages; for mortgages and charges (even land charges, judgments, and the like) are not intended to be forthwith discharged so soon as they are effectively created, but are rather intended to continue in existence for a long time after

(*b*) Act 1897, s. 19.

the creation. The multiplicity of them, which ensues therefrom after a few years, adds greatly to the difficulty of clearly ascertaining, even in the case of registered land, on the occasion of each subsequent dealing with the land by way of sale or mortgage, that the title is in fact free from incumbrances, and from other such like matters affecting the title to or the full and free enjoyment of the lands. Solicitors and trustees conducting or effecting purchases and mortgages on behalf of their clients and *cestuis que trustent* respectively, have been many times hit, as for negligence in not discovering in time the registered adverse dealing, and have accordingly been made liable personally to make good the loss sustained. The Acts, therefore, which we have been discussing contain in general a provision, whereby solicitors and trustees may procure an *official search* to be made in the registries, and an *official certificate* to be given them of the result of such searches. The Conveyancing Act, 1882 (*c*), having paved the way for such official searches and official certificates in the case of judgments, Crown debts, and the like, the provisions of that Act in this behalf have been in general adopted also, by reference or otherwise, in the more recent Acts concerning registration, *e.g.*, by sect. 17 of the Lands Charges, etc. Registration Act, 1888, and by sect. 2 of the Land Registry (Middlesex Deeds) Act, 1891. By the First Schedule to the last-mentioned Act, and the express provisions of a Rule made for carrying into effect its provisions (*d*), when any one obtains, in the prescribed manner, an official certificate of search, he will not be answerable in respect of any loss that may arise from error in such certificate; and where such a certificate is obtained by any solicitor acting for trustees, executors, or other persons in a fiduciary position, these latter or any of them shall not be answerable in respect of any loss so arising. Under the rules as to official searches (Rules 222—230),

(*c*) 45 & 46 Vict. c. 39, s. 2.

(*d*) Rules of Feb. 1892, r. 14.

made pursuant to the Land Transfer Act, 1897, it is provided (by Rule 228), that when a solicitor or other person obtains an official certificate of the result of any search, he shall not be answerable in respect of any loss which may arise from any error in the certificate; and that when the certificate is obtained by a solicitor acting for trustees or executors, or other fiduciary persons, these persons also shall not be answerable.

16. DECLARATION OF TITLE ACT, 1862.—In the same year that the office of Land Registry was established by the Land Registry Act, 1862, there was passed a somewhat similar Act, namely, the Declaration of Title Act, 1862, whereby a *judicial* declaration of title might be obtained, provided the conditions prescribed by the Act were complied with. The prescribed conditions, however, were of a very burdensome character, and the Act has accordingly proved a dead letter. Still, the provisions of the Act, seeing that they remain unrepealed, may be briefly stated. After reciting the expediency of enabling landowners to obtain, by judicial declaration, a title that should be indefeasible in favour of purchasers for value, the statute enacted that, on the petition of the landowner, the Court might order his title to be investigated in the same way as if he had obtained, as vendor, a decree for the specific performance of an agreement for the sale of the land in question, for the estate claimed in his petition (*e*). After such investigation, if the court is satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept, it will (on the conditions in the Act mentioned) make an order that, on some day not less than three months afterwards, a declaration shall be made establishing the petitioner's title, unless in the meantime cause is shown to the contrary (*f*). In order to secure the object of duly affording to all persons concerned the opportunity of showing

(*e*) Sect. 6. (*f*) Sect. 8; *In re Roberts*, (1870) L. R. 10 Eq. 402.

cause against the making of the declaration, a copy of the Order must be served on such persons, and deposited in such places, as in the Act described, for inspection. Such notice of the same having been so deposited is also to be duly given as by the Act prescribed. The petitioner is required also to cause advertisements to be inserted three times at least in such newspapers, and on such days, as the court shall direct, stating the Order, and also stating where a copy of it has been so deposited for inspection (*g*). Then, if no petition is presented against the proposed declaration of title within the time limited for that purpose, or if one has been presented, but the court is of opinion that no sufficient ground has been shown for refusing to make the declaration, the court, upon being satisfied that all the requisitions prescribed by the Act have been duly complied with, makes a declaration, that the petitioner has such title to the lands in question as he seeks to establish by his petition, or such title subject to any qualifications necessary or proper to introduce into the order (*h*). And the effect of the declaration of title, once obtained, is by the Act stated as follows:—"Such declaration of title, as soon "as it shall have become final for the purpose of this "Act, shall (in favour of any person thereafter deriving "title as a purchaser for valuable consideration of the "land therein referred to, or of any part thereof, or of "any estate, right, or interest therein, from or under the "person whose title has been so declared), be deemed "and taken to have correctly declared the same; but "save as aforesaid, such declaration shall have no force "or effect whatever as to the title to the land comprised "therein" (*i*). But, by sect. 29 of the Act, the declaration of title does not affect land tax, succession duty, tithe rentcharge, right of common, ways and the like, rents payable to the Crown, franchises and the like, or public rights of way.

(*g*) Sect. 11. (*h*) Sect. 15. (*i*) Sect. 24.

CHAPTER XXVI.

ON THE DEATH DUTIES ON LAND, AND OF THE ESTATE DUTY IN PARTICULAR.

A DUTY, under the name of Legacy Duty, has for a very long time been payable by the law of England on the beneficial interests in personalty devolving upon the deaths of deceased owners, whether dying testate or intestate. Regarding this duty, more will be said when we come to treat of title by will and by administration (*k*). It will be sufficient in this place to mention, that the legacy duty ranged, and (unless where otherwise hereinafter mentioned) still ranges, from 1 to 10 per cent. Also, a duty, under the name of Probate Duty, has for a very long time been payable by our law on the total net amount of the personal estate of a deceased testator or intestate passing under his will or upon his intestacy. To that duty a further duty called Account Duty was lately added. Both these duties were payable by the executor or administrator of the deceased, on his applying for probate of the will, or (as the case might be) for a grant of letters of administration to the personal estate of the deceased, as will also be more fully explained hereafter, in the chapter on title by will and by administration (*k*).

But, as regards real estate, no probate duty or account duty was ever payable. A duty, under the name of Succession Duty, which corresponded (in essentials) with the legacy duty above mentioned, and was not at all like probate or account duty, was imposed in the year 1853, on the beneficial interests in land devolving,

(*k*) Bk. II. pt. II. ch. VII.

on the death of the deceased owner of realty (called the predecessor), upon the persons then becoming entitled thereto, under the will, or upon the intestacy, of such deceased owner. The Act by which this succession duty was originally imposed was the Succession Duty Act, 1853 (*l*), which applies to all deaths which have happened since the 19th day of May, 1853, or which shall hereafter happen. And it will be convenient here to expound, with some little detail, the provisions of the Act in question, and of the Acts which have in some few particulars amended it. It will also be convenient to consider, and with some greater detail, the provisions of the Finance Act, 1894 (57 & 58 Vict. c. 30), by which a new death duty has been created under the name of Estate Duty, which new duty corresponds (in essentials) with, and supersedes, the probate duty above referred to. For the new duty extends, not only to personal estate (on which alone probate duty and account duty were formerly chargeable), but also to real estate (which, as we have said), was theretofore exempt altogether from probate duty and from account duty.

1. The Succession Duty.—This is a duty payable by the successor to real property, including leaseholds, when the succession is on death, and the successor is (in effect) a volunteer, and not a purchaser for value; and it is payable also in respect of any increase of beneficial interest accruing or arising to the successor, through the cesser (upon death) of any annuity or other like charge on the real estate comprised in the succession. The duty varies according to the degree of consanguinity of the volunteer to the donor of the real estate; and is calculated according to a varying percentage on the value of the succession to the successor. It is payable by certain prescribed instalments, the first of them becoming due and payable at the expiration of twelve calendar months

(*l*) 16 & 17 Vict. c. 51.

from the time when the successor's title accrues in possession. The varying percentage at which the duty is, by the Act, appointed to be calculated, appears by the following statement (*m*), namely :—

£1 per cent. on the value of the succession, where the successor is of the lineal issue, or is a lineal ancestor, of the predecessor;

£3 per cent. on the value of the succession, where the successor is a brother or sister, or a descendant of a brother or sister, of the predecessor;

£5 per cent. on the value of the succession, where the successor is a brother or sister of the father or mother of the predecessor, or is a descendant of such brother or sister;

£6 per cent. on the value of the succession, where the successor is a brother or sister of the grandfather or grandmother of the predecessor, or is a descendant of such brother or sister; and

£10 per cent. on the value of the succession, where the successor is in any other degree of collateral consanguinity to the predecessor, or is a stranger in blood to him.

Where the successor is the husband or wife of the predecessor, no duty is payable (Stamp Act, 1815, Schedule, Part III.).

And as regards the value of the succession, in the case of each successor, his beneficial interest (*i.e.*, his succession) is to be deemed to be of the value of an annuity equal to the annual value of the real estate comprised in his succession, such annuity being taken as continuing during his life or for any less period for which the estate is limited to him. And the value of such annuity is (for the purposes of the duty) ascertained according to certain Tables set forth in a schedule to the Act.

The duty is, by the Act, appointed to be paid by eight equal half-yearly instalments, the first at the end of twelve

(*m*) 16 & 17 Vict. c. 51, s. 10.

months after the successor shall have become entitled in possession to the beneficial enjoyment of the property, the seven remaining instalments at equal half-yearly intervals of six months each, to be computed from the day on which the first was due and payable.

These rules concerning the ascertainment of the duty payable, and its payment, apply, whether the successor is entitled for his life only or other such less estate as aforesaid, or is entitled in fee simple or in fee tail. It is provided, however, that in case the successor shall die before all the instalments of duty fall due, the remaining instalments are to cease to be payable. On the other hand, in the case of a successor whose estate does not so then determine, or who was competent to dispose by will of a continuing beneficial estate or interest in the land comprised in his succession, it is provided that the instalments remaining unpaid at his death, whether then already due and payable, or thereafter accruing due and payable, are to continue payable. For this purpose they constitute a charge upon the land comprised in the succession, and this in exoneration of the other property of the deceased successor (*n*); so that there arises (in such a case) a *double* succession duty, that is to say, the estate of the new successor becomes liable for his own new succession duty, and also for the unpaid remnants of the old succession duty originally payable by his immediate predecessor.

As regards powers of appointment, and estates and interests arising from the exercise of such powers (being powers contained in deeds or other dispositions of property that take effect upon the death of any one), it is provided that, in all cases of a general power of appointment, the donee of the power shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the real estate thereby appointed, and to be entitled thereto as to a succession derived from the donor of the

(*n*) 16 & 17 Vict. c. 51, s. 21.

power, as the predecessor. On the other hand, in all cases where the power of appointment aforesaid is merely a special power (that is to say, is a power which the donee thereof cannot exercise for his own sole and exclusive benefit), it is provided, that the appointee who becomes entitled under any exercise of the power (and not, as in the former case, the donee of the power) shall be deemed to become entitled to the real estate appointed to him, as to a succession derived from the donor of the power, as the predecessor (*o*). But the donee of the power, where (as in the case of a general power) he becomes chargeable with the duty, is not to be subjected to double duty, that is to say, he is not to be chargeable with duty in respect of the real estate appointed by him under such general power, and also with the duty payable on a succession in the same property taken by himself independently of the power. In the case of such conjunction of general power with beneficial estate, he is to be allowed, off the duty payable by him as donee of the power, any duty he may have already paid in respect of his own independent beneficial succession (*p*).

These observations will suffice on the succession duty as originally imposed by the Succession Duty Act, 1853, there being many specific provisions contained in that Act which are of too minute a character to be dealt with in this work.

The Succession Duty Act, 1853, has been recently amended, in some particulars, by the Custom and Inland Revenue Acts, 1888 (*q*) and 1889 (*r*), and the Finance Act, 1894 (*s*).

By the first of these three Acts (*t*), an additional succession duty of 10*s*. per cent. has been added to the succession duty when it is payable at the rate of 1*l*. per cent., and an additional duty of 30*s*. per cent. when it is

(*o*) 16 & 17 Vict. c. 51, s. 4.
(*p*) *Ibid.* s. 33.
(*q*) 51 & 52 Vict. c. 8.
(*r*) 52 & 53 Vict. c. 7.
(*s*) 57 & 58 Vict. c. 13.
(*t*) 51 & 52 Vict. c. 8, s. 21.

payable at the rate of 3*l.*, 5*l.*, 6*l.*, or 10*l.* per cent. By the second of the three Acts (*u*), certain provisions are made for the protection of purchasers and mortgagees against liability for the unpaid succession duty, where they are *bonâ fide* purchasers or mortgagees, and were without notice of the duty having remained unpaid; and this protection arises, in favour of such *bonâ fide* purchasers and mortgagees, after the expiration of twelve years (and, in certain cases, after the expiration of six years) from the happening of the succession. By the third of the three Acts (*v*), but only in the case of successors competent to dispose of the real estate comprised in their succession, it is provided, that the value of the succession on which the duty is to be payable shall be the principal value of such real estate, *less* the estate duty imposed by that Act, and *less* certain expenses incident to the payment of such last-mentioned duty. The principal value of the succession is now to be ascertained in the same way as if it were being ascertained for the purposes of the estate duty; and the succession duty is now to be payable by the like instalments as by the Act are appointed for the payment of the estate duty thereby imposed.

2. The Estate Duty.—The Customs and Inland Revenue Act, 1888 (*x*), besides amending the Succession Duty Act, 1853, in the particulars above referred to, imposed also a new tax called the Estate Duty, being a payment at the rate of 1*l.* per cent. on all personal estate liable to probate duty, where the estate on which such duty was to be paid exceeded 10,000*l.*, or liable to account duty, where the estate on which such duty was to be paid exceeded 10,000*l.*; and on all real estate comprised in any succession and liable to succession duty, where the estate on which such duty was to be paid exceeded 10,000*l.* But the duty so imposed was intended to be of a merely

(*u*) 52 & 53 Vict. c. 7, ss. 10—15.

(*v*) 57 & 58 Vict. c. 30, s. 18.

(*x*) 51 & 52 Vict. c. 8, s. 21.

property is situate out of the United Kingdom or not; but any duty payable, by the *lex situs*, on property abroad, is to be deducted from the principal value of the property subject to estate duty (sect. 7, sub-sect. 4). Of course, the estate duty does not attach to property passing on the death of the deceased, of which he was but a trustee for third parties or strangers, without having therein any continuing beneficial interest of his own (sect. 2, sub-sect. 3); but trust property held by him, under trusts created by himself, must be at least a year old (that is to say, the trust-dispositions must be at least a year old) at his death, and must be absolute alienations of the property comprised therein, if they are to escape liability to duty (sect. 2, sub-sect. 3). Moreover, the same principle is now applied to surrenders by a life tenant of settled property of his life interest to the remainderman; such surrenders, whether for value or not, must be made at least a year before the surrenderor's death, and *bonâ fide* possession must be assumed by the remainderman to the entire exclusion of the life tenant, in order to prevent the property being deemed to pass on the death of the life tenant (Finance Act, 1900, s. 11). *Bonâ fide* purchasers for full consideration are exempt (sect. 3), although their purchases should have left a life estate outstanding in the deceased (their vendor), an exemption which is manifestly not intended to extend to the purchaser, from the reversioner or remainderman, of his reversion or remainder falling into possession on the death of the deceased (see sect. 21, sub-sect. 3) (*b*). Annuities and pensions granted by the Government of British India, and payable to the widows and children of deceased officers of that Government, are expressly exempted (sect. 15). An advowson is only to be aggregated with the other property passing on the death of the deceased, if it be (in effect) sold, and then only the net sale proceeds are to be aggregated (sect. 15). The

(*b*) *In re Vernon*, [1901] 1 K. B. 297.

duty may be remitted on pictures, books, and works of art of historical or scientific value bequeathed to the public (sect. 15); and, by the Finance Act, 1896 (*c*) s. 20, pictures, works of art, and other like things not yielding income are to form an estate by themselves, and are not to be aggregated with the general estate; and while they are enjoyed in kind by a person not capable of disposing of them, they are to be exempt from estate duty,—but otherwise they are liable to the duty.

The parties required to pay the estate duty are as follows:—First, the executor is required to pay the estate duty on all the personal estate of the deceased of which the deceased was competent to dispose, and may pay it upon other property of which he has control by virtue of the will, or, in the case of property not under his control, at the request of the persons accountable for the duty (sect. 6). He must also pay interest thereon at the rate of 3 per cent. from the death, down to the delivery of the Inland Revenue affidavit (*d*). If such affidavit is not delivered within six months from the death, then the estate duty (this proportion of it) with interest thereon at 3 per cent. from the death up to the expiration of these six months becomes *duty in arrear* (sect. 6, sub-sect. 6), and thereafter carries interest at 4 per cent. (sect. 8, sub-sect. 10), that being the rate of interest payable, under the Inland Revenue Act, 1868, s. 9, on arrears of legacy duty. Second, as regards all the other parts of the aggregate estate, the estate duty thereon is required to be paid by the person to whom the property passed for a beneficial interest or, to the extent of the property actually received by him, by every trustee, guardian, committee or other person in whom any interest in the property passing or the management thereof is at any time vested (sect. 8, sub-sect. 4). In all this second group of cases, equally as in the first

(*c*) 59 & 60 Vict. c. 28. (*d*) *Ibid.* s. 18.

group of cases, interest at 3 per cent. from the death, and, after the expiration of six months from the death, at 4 per cent., is payable. But, as regards real estate, the party accountable may, at his option, pay the duty thereon by eight equal yearly instalments or sixteen half-yearly instalments, with interest at 3 per cent. from the expiration of twelve months from the death, at which last-mentioned date the first instalment of the duty becomes in that case due (sect. 6, sub-sect. 8) (*e*), any instalment not paid on the due date becoming instantly *duty in arrear*, and carrying 4 per cent. until payment. By sect. 18 this mode of paying the estate duty on real estate by instalments is made applicable also, for the future, to the payment of the succession duty properly so called of which we treated above. And whereas the executor pays the estate duty on his delivery of the Inland Revenue affidavit, the accountable party (where he and not the executor is liable to pay it, and pays it) pays it on delivery of an account setting forth the necessary particulars, which account is to be delivered, like the Inland Revenue affidavit, within, at the latest, six months from the death of the deceased. Any alienee of an accountable party's interest, equally with the accountable party himself, is liable for the estate duty (sect. 8, sub-sect. 4); and a rateable part of the estate duty, as regards all those parts of the aggregate estate which did not vest in the executor *virtute officii* as aforesaid, is made a first charge on the property in respect of which it is leviable (sect. 9, sub-sect. 1). Presumably, therefore, this charge, if remaining unsatisfied at the date of any sale, will be paid out of the purchase money (sect. 6, sub-sect. 8), just as the ordinary practice has been with unpaid succession duty; and a purchaser or mortgagee will experience some difficulty in satisfying the Inland Revenue Commissioners that he is entitled (within sect. 8, sub-sect. 18) to exemption from liability to the

(*e*) And see Finance Act, 1896, s. 18.

estate duty, by reason of his being a *bonâ fide* purchaser or mortgagee without notice.

The Finance Act, 1894, contains also divers provisions of an extremely useful and practical character for raising the estate duty, and for giving limited owners and others who pay the whole duty the benefit of the charge for duty which (if the duty were unpaid) would continue to subsist against the property itself (sect. 9). These provisions apply, of course, only to the estate duty, which is payable by the accountable party as contradistinguished from the executor; but the executor paying any estate duty which he is not (by the Act) required as such to pay, is equally entitled to the benefit of such a charge (sect. 9, sub-sect. 4). The Act contains also provisions for the return of estate duty when too much has been paid, and for the payment of further duty when too little has been paid in the first instance; and provisions for postponing payment on terms, in cases in which the whole duty cannot, without a great sacrifice or hardship to the estate, be paid at once. It likewise provides for the commutation of the duties on remainders, reversions, and other future interests (all of which are, in the Act, called *interests in expectancy*) (sect. 12), and for the payment of one lump composition duty where the interests are complicated (sect. 13); and for the granting of certificates by the commissioners, to the effect that the duty in respect of any property has been paid (sect. 11).

As regards property vesting in the executor *virtute officii*, it is to be remembered, that much of the real estate to which the deceased was solely entitled in fee simple now vests in him, by virtue of the Land Transfer Act, 1897, s. 1; but whether the executor becomes therefore *bound* to pay the estate duty in respect of such real estate, appears to be, at the least, doubtful. And most probably, having regard to sect. 5 of that Act, he is not *bound* to pay that duty, but in due course will transmit the real

estate to the heir or devisee thereof, subject to the duty (sect. 3).

Besides the estate duty, the Finance Act, 1894, by sect. 5, imposes a *further estate duty*, in the Act called *settlement estate duty;* and (by sect. 17) fixes one uniform rate of 1*l.* per cent. for this further estate duty. This settlement estate duty is payable on property in respect of which estate duty is leviable, and which is settled by the will of the deceased (*f*), or, having been settled by some other disposition, passes to some person not competent to dispose of the property, except where the only life estate in the property after the death of the deceased is that of the husband or wife of the deceased. This duty is payable only once during the continuance of the settlement, and once estate duty is paid on settled property, no more is leviable until the property vests in one competent to dispose of it and *sui juris* (sect. 5 as amended by sect. 13 of the Finance Act, 1898). And now by sect. 12, sub-sect. 2, of the Finance Act, 1900, the estate duty payable on settled property passing on deaths after 9th April, 1900, is not, by an aggregation of the deceased's estate, to be increased more than one half per cent. in excess of the rate which would be payable if the settled property had been a separate estate.

In respect of property settled by Act of Parliament or royal grant, in such manner as that the beneficiary cannot aliene it, the estate duty is payable, but not the further estate duty; and such settled property is, for the purpose of such estate duty, to be an estate by itself, and is not to be aggregated with any other property passing on the death of the deceased (sect. 5, sub-sect. 5). Also, by the Finance Act, 1896, s. 19, the settlement estate duty, when payable in respect of a settled legacy, is payable out of that legacy; and when payable in respect of personal property settled (*g*) by the will of the deceased, is payable

(*f*) *Re Campbell*, [1902] 1 K. B. 113.

(*g*) *Re Lewis*, *Lewis* v. *Smith* [1900] 2 Ch. 176.

out of that property. But otherwise it is payable out of the property generally (*h*). And, by the Finance Act, 1898, s. 14, any settlement estate duty payable in respect of any property which is only contingently settled, if actually paid, is to be refunded on the contingency failing to happen (*i*).

Finally, it may be mentioned, that, in the case of small estates, where the property on which the estate duty is payable does not exceed 1,000*l.* in value, it is made to form (for the purposes of the estate duty) an estate by itself, and is not aggregated with the other property (if any) passing on the death of the deceased; and the estate duty, being paid on such estate by itself, supersedes not merely the settlement estate duty, but the legacy and succession duties also (sect. 16, sub-sect. 3). Estates not exceeding 300*l.* go free of all duty on payment of 30*s.* only; and estates not exceeding 500*l.* go free of all duty on payment of 50*s.* only (sect. 16, sub-sect. 1).

(*h*) *Gribble* v. *Webber*, [1896] 1 Ch. 914; *Cook* v. *Culverhouse*, [1896] 2 Ch. 251; *Wade* v. *Wade*, [1898] 2 Ch. 276.

(*i*) *Smith* v. *Lord Advocate*, (1902) W. N. 167.

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